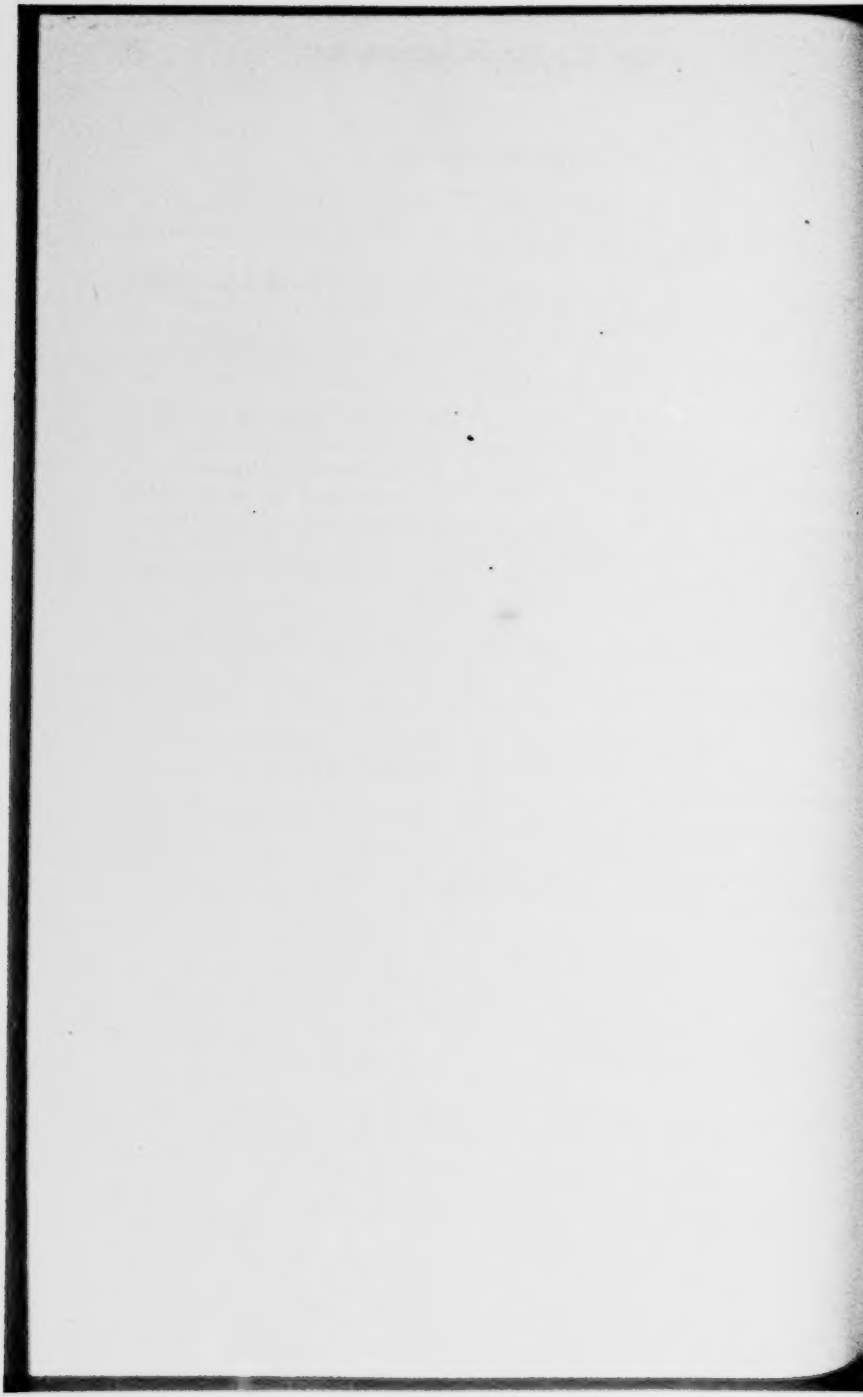

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(18,896)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 19[illegible]

No. 262.

FILED
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THE STATE OF OHIO ON THE RELATION OF JOHN LLOYD,

PLAINTIFF IN ERROR,

vs.

JOSEPH B. DOLLISON, SHERIFF OF GUERNSEY COUNTY, OHIO,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

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(18,896)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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THE STATE OF OHIO ON THE RELATION OF JOHN LLOYD,

PLAINTIFF IN ERROR,

vs.

JOSEPH B. DOLLISON, SHERIFF OF GUERNSEY COUNTY, OHIO,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the eighth day of July, A. D. 1902, the relator, John Lloyd, a resident of the city of Cambridge, in the county of Guernsey, state of Ohio, was arrested by M. E. Gallup, one of the constables of said county.

The warrant for such arrest was issued to such constable by one T. J. Calvert, a justice of the peace in and for Center township, Guernsey county, state of Ohio, which township was wholly without the municipal or city boundaries of said city of Cambridge.

That by virtue of said order of arrest the relator, John Lloyd, was committed to the county jail in said Guernsey county, and was held in custody, imprisoned and restrained of his liberty thereunder and thereafter by the defendant in error herein, Joseph B. Dollison, the duly elected and qualified sheriff of said county of Guernsey.

The mittimus, affidavit and warrant all appear fully set forth in the record herein, but the substance of the same is as follows: That this relator on the seventh day of July, 1902, at the county of Guernsey, and within the corporate limits of the city of Cambridge, did unlawfully sell and furnish intoxicating liquors to one E. L. Scott, a resident of the city of Cambridge, in the quantity of six pints of beer, being an intoxicating liquor, to be used as a beverage, and then and there keeps a place where such intoxicating liquors are kept for sale, given away, and furnished for beverage purposes. The charge further stated, that these acts violated a certain statute theretofore enacted by the General Assembly of Ohio on the third day of April, 1902, commonly called the "Beal Local Option Law." It further alleged that said act of the General Assembly had taken effect in said city of Cambridge by virtue of an election for such purposes theretofore held in said city May 6, 1902.

It further alleges that said sale, etc., was not made by the relator at retail as a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes, and the charge further alleges that said relator was not a manufacturer of intoxicating liquors from the raw

material, and said quantities so sold, and not being sold and delivered and furnished as his product as such manufacturer in wholesale quantities to a bona-fide retail dealer trafficking in intoxicating liquors in said city of Cambridge, Ohio, but "wholly and directly in violation of said Beal municipal local option law so passed by said General Assembly of the state of Ohio, April 3, 1902."

It further set forth that the village of Pleasant City, a municipal corporation within said county, also prior to the committing of said alleged offense had voted upon the taking effect of this same criminal law, and that said criminal law *was not in force and effect in any other municipality or geographical territory in said county of Guernsey,* save and except within the municipal territory or boundary of Cambridge. (See Record, page 17).

That on said eighth day of July, 1902, the said T. J. Calvert as such justice of the peace, "examined relator" on such charge, but did not find him guilty or probably guilty, but required him to give bail in the sum of three hundred dollars ($300) for his appearance before the Common Pleas Court of said county, which requisition the relator failed to comply with, whereupon he was committed to the jail of said county as aforesaid by said constable.

The records show that the said Beal law had not been voted upon and indeed could not be voted upon under its provisions so as to take effect in said Center township, the place of arrest and alleged examination, and as to that place the law was wholly *extra territorial* for every purpose, and of course for criminal purposes. That thereafter on July 15, 1902, the relator made application by petition for a writ of habeas corpus to the Honorable John M. Cook, one of the circuit judges, in and for said Guernsey county, a judge having jurisdiction in chambers under the Ohio laws in such writs.

A writ of habeas corpus was forthwith issued by such court upon said petition, and on same day a return and answer was made by the defendant, J. B. Dollison, sheriff of Guernsey county, to which answer a demurrer was filed and overruled, and said answer taken as true, and the said relator was refused a writ of habeas corpus and remanded to jail. (See Record, 13, 14 and 15). Exceptions were taken to the findings, judgment and decree of the said judge, John M. Cook, and a writ of error was duly prosecuted to the Supreme Court of the state of Ohio, being the highest court of law and equity having jurisdiction in error proceedings and said findings, judgment and decree of the trial court was affirmed and confirmed, to all of which said relator took exceptions, and filed his petition for writ of error to the Supreme Court of the United States in compliance with the provisions of Sections 709 and 710, R. S. of United States, as amended 1875, 18 statute at large, as appears of record (page 1 to 9).

The assignment of errors duly certified to this court are as follows:

SPECIFICATION OF ERRORS.

The Supreme Court of the state of Ohio erred in holding and deciding that an act of the General Assembly of the state of Ohio, passed April 3, 1902, entitled an act "to amend Section 4364-20, of the Revised Statutes of Ohio, and to supplement said section by enacting supplementary Sections 4364-20a, 4364-20b, 4364-20c, 4364-20d, 4364-20e, 4364-20f, 4364-20g, 4364-20h and 4364-20i," (95 O. L., 87-91) was valid.

The validity of said act was denied and drawn in question by the plaintiff in error, on the ground of it being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of the state of Ohio erred in holding and deciding:

First. That said act of April 3, 1902, did not abridge the privilege and immunities of citizens of the State of Ohio, or of this relator, John Lloyd, as guaranteed by the fourteenth amendment of the Federal Constitution.

Second. That said act did not deny to the citizens or to the relator, John Lloyd, within the jurisdiction of the United States and of the state of Ohio, the equal protection of the laws, as guaranteed by the fourteenth amendment of the Federal Constitution.

Fourth. That the said accused, John Lloyd, did enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the alleged crime had been committed, and that the said jury district had been previously ascertained by law, and that the said accused had been duly informed of the nature and cause of the accusation against him, and that the said relator, John Lloyd, was protected and secure in his person, house, papers and effects against unreasonable seizure, as guaranteed by article 4 and article 6 of the amendments of the Constitution of the United States.

Fifth. That said act as applied to this relator, John Lloyd, did not impair the obligation of contracts, contrary to the provisions of the Federal Constitution, article 1, section 10.

Sixth. In finding that said relator, John Lloyd, was guilty of violating said act by selling and furnishing intoxicating liquors to one E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, to be used as a beverage.

And in finding the said relator, John Lloyd, guilty under said act of keeping a place where intoxicating liquors are

kept for sale, given away and sold for beverage purposes, and in violation of said act.

By the provisions of Section 1 of said act, any other citizen of the city of Cambridge, county of Guernsey, could give away said quantity of beer, for such purposes, and could then and there keep a place where such beer could be given away for beverage purposes *in such citizen's private dwelling.*

The exact language of the closing paragraph of one of the subdivisions of said section is in words as follows:

"The words 'giving away' where they occur in this act shall not apply to the giving away of intoxicating liquors by a person in his private dwelling, unless such private dwelling is a place of public resort."

That by said exception to said act this relator, John Lloyd, was not afforded the equal protection of the laws, or the same protection of the laws, as was extended then and there, to such owners of their private dwellings in the said city of Cambridge, Ohio.

Seventh. In finding that said relator, John Lloyd, was guilty of violating said act by selling and furnishing intoxicating liquors to one E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, to be used as a beverage, and in finding the said relator, John Lloyd, guilty under said act of keeping a place where intoxicating liquors are kept for sale, given away or sold for beverage purposes, in violation of said act, whereas, by the provisions of said Section 1 of said act, a special exemption was given then and there to manufacturers of intoxicating liquors from the raw material, so that such manufacturers could then and there, sell, deliver, furnish and give away said quantity of beer to bona fide retail dealers trafficking in intoxicating liquors and could sell, deliver and furnish or give away said quantity of beer to any party or parties residing outside of the limits of said

city of Cambridge, wholly without offending against said act or violating the criminal provisions thereof.

Eighth. In finding that said relator, John Lloyd, was guilty of violating said act, by selling and furnishing intoxicating liquor to one E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, and in finding the said relator, John Lloyd, guilty under said act of keeping a place where intoxicating liquors are kept for sale, given away or sold for beverage purposes, in violation of said act, whereas, by the terms of said act, all the citizens of said county of Guernsey, residing outside of the city of Cambridge in said county, being 49-50 of said territory of said county, were protected by the laws of the state of Ohio against arrest, seizure and imprisonment in doing and performing *the same act in the same way and at the same time, to wit,* all such citizens of the said county of Guernsey, and the state of Ohio, then and there residing outside of the municipal boundaries of the municipalities of the state, were afforded the right and privilege to sell, furnish or give away intoxicating liquors to said E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, or in any other quantity whatsoever, to be used as a beverage, and all of such citizens residing outside of said municipality of Cambridge in said county, could then and there, keep a place where intoxicating liquors are kept for sale, given away, or were kept for sale, given away or sold for beverage purposes without violating said act, and without committing any offense punishable under the penal laws or criminal provisions of said act, wholly in contravention of the last clause of Section 1, and as guaranteed to this relator, John Lloyd, by the fourteenth amendment of the Federal Constitution.

Ninth. In finding that said relator, John Lloyd, was guilty of violating said act by selling and furnishing intoxicating

liquor to one E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, and in finding the said relator, John Lloyd, guilty under said act of keeping a place where intoxicating liquors are kept for sale, given away or sold for beverage purposes in violation of said act, whereas, by the terms of said act, all the citizens of said county of Guernsey, *residing in the villages and cities of said county of Guernsey, and all the citizens in the municipalities of the remaining portion of said state of Ohio, where a vote upon the question of the sale of intoxicating liquor,* as provided by said act had not been taken, or, if said vote had been taken under the provisions of said act and failed to carry by a majority of the electors thereof, under the provisions of said act, were then and there protected by the laws of the state of Ohio against arrest, seizure and imprisonment, in doing and performing *the same act in the same way, at the same time that the said accused sold said quantity of beer set forth herein to be used as a beverage,* and all of such citizens, as above described, were afforded the right and privilege to then and there sell, furnish or give away intoxicating liquors to said E. L. Scott, in such municipalities and villages in the quantity of six pints of beer, or in any other quantity whatsoever, to be used as a beverage, and all of such citizens, residing in such municipalities, could at the time the said accused and relator was under arrest, and at the time he was arrested, and did at will, keep a place where intoxicating liquors are kept for sale, given away or sold for beverage purposes, without violating said act, and without committing any offense punishable under the penal or criminal provisions of said act, wholly in contravention of the last clause of Section 1, of the fourteenth amendment, and as guaranteed to this accused by the fourteenth amendment of the Federal Constitution.

Tenth. In finding that relator, John Lloyd, was guilty of

violating said act, by selling and furnishing intoxicating liquor to one E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, and in finding the said relator, John Lloyd, guilty under said act of keeping a place where intoxicating liquors are kept for sale, given away or sold for beverage purposes, in violation of said act, whereas, *each railway corporation, within the state of Ohio, and within said city of Cambridge, to wit, the Baltimore & Ohio Railway Company and the Pennsylvania Railway Company, through its servants, agents, conductors and porters, were authorized, then and there, within the limits of said municipal boundaries of the city of Cambridge,* as well as throughout the state of Ohio, and all other railroads within the state of Ohio, operating and controlling, not to exceed two hundred miles of railway within this state, by the payment of three hundred and fifty dollars ($350.00), as an annual tax, or, if operating more than two hundred miles of railway within this state, by the payment of seven hundred dollars ($700.00) as an annual tax, were then and there authorized, to maintain and conduct places within said city of Cambridge, where intoxicating liquors for beverage purposes were sold at retail, and were authorized, permitted and privileged, at the same time and place, to sell, furnish and give away, six pints of beer, or any other quantity whatsoever, to be used as a beverage to said E. L. Scott, or to any other citizen whatsoever, without violating said act, or any of the provisions thereof, and without committing any offense, punishable under the penal or criminal provisions of said act. That all of said privileges, immunities and rights were expressly granted by the same General Assembly that passed the aforesaid act by supplementing the liquor laws of the state of Ohio, by extending said privileges and immunities to such railway corporations, in an act passed May 12, 1902, entitled an act "to supplement Section 4364-9 of the Revised

Statutes of Ohio, and to provide for a tax upon, and to regulate *the business of the sale of intoxicating liquors upon dining and buffet cars upon railroad traversing the state of Ohio.*"

That by reason of these immunities and privileges granted and extended to said railroad corporations, their porters, conductors, servants and employes, and to their passengers, to so buy, sell and give away intoxicating liquors in buffet and dining cars, upon their said trains, within the said municipal boundaries of the city of Cambridge, at the same time and place and in the same way, that was forbidden to this accused and relator, it did not and does not afford to the said accused the equal protection of the laws, and it did not and does not afford to the other citizens of the city of Cambridge, *the equal protection of the laws as guaranteed by the first section of the fourteenth amendment of the Federal Constitution.*

Eleventh. In finding that the relator, John Lloyd, was guilty of violating said act, by selling and furnishing intoxicating liquor to one E. L. Scott, resident of the city of Cambridge, Ohio, in the quantity of six pints of beer, and in finding said relator, John Lloyd, guilty under said act, of keeping a place where intoxicating liquors are kept for sale, given away, or sold for beverage purposes in violation of said act while all other citizens within the jurisdiction of the state, *residing outside of the said city of Cambridge, in said county of Guernsey, are governed by criminal laws, and were then and there governed by criminal laws that have and had a uniform operation throughout the state.*

And were not deprived of their liberty by an alleged criminal law, or a law regulating crime within certain municipal boundaries and territory of the state, and not operative in the non-municipal districts of the state. And all other citizens of said county of Guernsey, residing outside of the municipal boundaries of said city of Cambridge, *are governed, controlled and*

punished only for the violation of laws that are passed and made to take effect upon the approval of the General Assembly of the state of Ohio, and not made to take effect by the authority of the votes of the electors of the municipal territory of the state, or any section of the state; that so finding said relator guilty under said act so put in force and made effective by the electors of the city of Cambridge, denies to this accused the equal protection of the laws as guaranteed by the Ohio consituation and the fourteenth amendment of the Federal Constitution.

Twelfth. In finding that said relator, John Lloyd, was guilty as set forth in said record, and in being arrested and imprisoned under said act in that it does not afford the said accused the right to a speedy and public trial by an impartial jury of the state and *district wherein the crime as alleged,* has been committed, and deprives him of the selection of an impartial jury from a jury district, which had been previously ascertained by law in like manner to all other citizens of the state of Ohio, accused of crime, and wholly in violation of article 6 of the amendments of the Federal Constitution, and contrary to the provisons and guarantees of the fourteenth amendment of the Federal Constitution.

THE CONSTITUTIONAL PROVISION.

In the state of Ohio the duty of the Legislature to make the laws, and the incapacity of the electors to participate in their making, in regard to the liquor traffic, are ordained by four constitutional provisions.

By Section 18 of the schedule of the constitution, it is provided: "No licence to traffic in intoxicating liquors shall hereafter be granted in this state; but the General Assembly may, *by law,* provide against the evils resulting therefrom."

This section was submitted to, voted upon, and adopted by, the people of the state, as a separate and independent proposition. By this section the power to legislate against the evils of the liquor traffic was especially bestowed upon, and confided in, the legislature; the people by a separate vote, lodged the authority, exclusively, with the legislature, to make the law and to make it take effect.

The legislature, therefore, has no authority to transfer the power, responsibility and duty back to the people. It cannot parcel the power out among the voters of municipalities. The people granted the power away—to the legislature—and they can only resume its possession and exercise by an amendment to, or abrogation of, the constitution.

The effect of the eighteenth section of the schedule upon the delegation of legislative power in regard to the liquor traffic, has never been determined by State Court or Federal Court.

Another constitutional provision, the most important one, is Section 26 of Article 2, which is couched in these words:

"All laws of a general nature shall have a uniform operation throughout the state, nor shall any act, except such as relates to public schools, be passed to take effect upon the *approval of any other authority* than the General Assembly, except as otherwise provided in this constitution."

Statutes which change the boundaries of counties, or which create new counties, or which remove county seats, are required to be submitted to the electors for approval or disapproval, and hence are "otherwise provided for in the constitution."

Sec. 30, Art. 2.

Another constitutional provision is this:

"The legislative power of this state (1) shall be vested in a general assembly, (2) which shall consist of a senate and a house of representatives."

Art. 2, Section 1.

The fourth provision is as follows:

"No power of suspending laws shall ever be exercised except by the General Assembly."

Sec. 18, Art. 1.

The effect of the operation of this law, if it should be sustained, will be that in some municipalities of the state, sales of intoxicating liquors *will be state crimes,* while in others, often in the same county, they will be innocent acts. The innocence or criminality of these acts for two years at a time are made to depend upon the opinions of electors of particular localities, "counted off by the head." In Town A of County B, the sale of intoxicating liquors will be *a state crime,* whereas in the adjoining Town of C it will not have any of the ingredients of a state crime, because of a lack of votes to make it such. *Geographical lines will determine whether one is a state criminal or a law abiding citizen.*

An act which is a crime by virtue of the provisions of a state law, should be a crime all over the state. Intrinsically, in its very essence, such a statute is one of a general nature, and ought to be of general application, and not of local application as this law is.

In the case of Kelley vs. State, 6 O. S., 269, it was said:

"The act of the General Assembly of April 9, 1856, to restore to the Court of Common Pleas the jurisdiction of minor offenses in certain counties of the state, being general in its nature, and yet limited, in express terms to a number of counties in the state, as in conflict with the 26th section of the second article of the constitution, which requires that all laws of a general nature shall have a uniform operation throughout the state * * * They" (general laws) "cannot be withdrawn from the operation of the plain constitutional prohibition, unless by an exemption contained in the same instrument. And that exemption to be effectual, should be as explicit as the instrument itself. It must be founded in express terms, or at least, arise by implication fair and necessary."

The Beal law will be approved in some municipalities; in others it will be rejected. Its effect will be exactly tantamount to the effect which would have followed, if the legislature had provided that it should be enforced in municipalities specifically enumerated, and should not be law in other specifically named municipalities.

ENFORCEMENT OF THE LAW WILL DEFEAT THE PURPOSE OF THIS PROVISION.

The purpose of the first clause of Section 26, Article 2 will be defeated by this statute. The object of incorporating that provision in the constitution is well stated by Judge Thurman, in Cass vs. Dillon, 2 O. S., 618.

"The origin of this section is perfectly well known. The legislature had often made it a crime to do in one county or even twonship, what it was perfectly lawful to do elsewhere; and it provided that act, even for the punishment of offenses, should be in force, or not, in certain localities, as the electors thereof, respectively might decide. It was to remedy this evil, and prevent its recurrence, that this section was framed."

It will be observed that Judge Thurman says that part of the evil, or one of the evils, was that the electors of localities, prior to the constitution of 1851, had been authorized to decide, whether a criminal law should be in force or not there.

This is exactly what the electors are authorized to do by the Beal law.

GENERAL ASSEMBLY CANNOT ABDICATE ITS POWER.

This is not all. This statute allows the voters of small and large municipalities, to legislate on the subject of the liquor traffic; but the power to legislate on this subject was vested, exclusively vested, by Section 18 of the schedule, in the legislature. The command of that section, addressed to the legislature, is, that it shall provide against the evils of the liquor

traffic, not by the votes of the people of fractions of the state, but, *"by law,"* enacted by the legislature.

The legislature has no right to abdicate its power.

Pertinent to this topic is the case of People vs. Collins, 3 Mich., 416, in which it was said:

"Public opinion will prevail, but it will be enlightened, deliberate, permanent and *originally expressed public opinion.* It is this opinion alone which the constitution designed should govern. Such a government secures deliberation and responsibility in legislation, and affords protection against the despotism of official rules on the one hand *and of irresponsible numerical majorities on the other.* It has been appropriately termed the 'flower of modern civilization.'"

In the enactment of laws for the government of the state and its people, the people are entitled to have the benefit of the assembled wisdom of the members of the legislature, their representatives.

The organic imperfection of the Beal law is illustrated by the judicial utterances of the Supreme Court of California, in Ex Parte Wall, 48 Cal., 279, where a local option statute was passed upon, and in which the court said:

"The statute under consideration simply permits a species of plebiscitum with reference to a particular subject in which the only option of the people of the township is to say 'Yes or No' to a complicated project. * * * The legislature *cannot transfer to others the responsibility of deciding what legislation is expedient or proper, with reference to either present conditions or future contingencies.* To say that the legislature may deem a law to be expedient, *provided the people shall deem it expedient,* is to suggest an abandonment of the legislative function by those *to whose wisdom and patriotism,* the constitution has entrusted the prerogative of determining what is or is not expedient."

Again, we quote some pertinent observations from the case of Barto vs. Himrod, 8 N. Y., 492; first, from Chief Justice Ruggles, thus:

"If the legislature cannot delegate to an individual the authority to determine by the mere exercise of his judgment whether a statute ought to take effect *or become a law,* it follows as a necessary consequence, that they cannot delegate it to the whole people. The constitution has no more authorized it in the latter case than in the former. The people have limited the exercise of their own power to the modes pointed out in the constitution. And although they hold the ultimate sovereignty of the state, they are subject like other sovereigns, to established fundamental law."

And by Justice Willard, the court said:

"If this mode of legislation is permitted and becomes general, it will soon bring to a *close the whole system of representative government which has been so justly our pride.* The legislature will become an irresponsible cabal, too timid to assume the responsibility of law givers, and with just wisdom enough to devise subtle schemes of imposture to mislead the people. All the checks against improvident legislation will be swept away, and the character of the constitution will be radically changed."

BEAL LAW IS A DELEGATION OF LEGISLATIVE POWER.

Law making, which includes the determination of the time and manner of the law going into effect, is a function of sovereignty. It is a trust which cannot be delegated. This is one of the fundamental principles of constitutional representative government.

True, these are elementary propositions, but sometimes they are useful for refreshment of memory.

One way to give countenance to the anarchist is to trifle with fundamental principles.

The test for determining whether the Beal law was, or was not, to take effect upon the approval of the voters of the municipality, seems to be very plain. The law must come from the legislature a complete rule of action. The law must prescribe a rule or rules of action. In every criminal statute there is one

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or more prohibitions expressed or implied, and one or more penalties. It would not be complete, if either the prohibition or penalty was absent. If there is anything lacking, if either of these elements is lacking, it is not a complete rule of action; and if that has to be provided for by anybody else but the legislature, it is not such a rule of action.

The intended rule of action in the Beal law is, that no one shall sell, etc., intoxicating liquors for beverage purposes in certain localities. This, we say is the rule of action. But the law did not come from the legislature a complete rule of action. Indeed, it did not, and does not, become a rule of action at all, until the majority of the electors of some municipality decide by vote, that the sale of intoxicating liquors shall be prohibited; and if, by a vote, it becomes a rule of action, at the end of two years, it can be revoked or suspended or repealed as a rule of action, by another vote.

The action which the rule is to affect, is that of selling, etc., intoxicating liquors for a beverage; but there is no rule of such action—prohibiting such action—until the electors so decide.

The legislature did not prescribe the rule of action; it is to be prescribed by the voters. It is plain that it was not the intent of the legislature to make the sale, etc., of intoxicating liquors unlawful, or a rule of action, until it—the rule—shall have the sanction and the approval of the voters, and on the failure to have a majority, then it is *not a rule of action in that territory;* the former law governs there then.

Beyond the absurdity of saying that such a law comes from the legislature a complete rule of action, there is only one stage of logical sophistry, and that is the annihilation of all rules of logic.

A LAW MUST REFLECT THE LEGISLATIVE WILL.

To be a law of the general assembly, a statute must express, reflect, *its* will.

In State vs. Morris, 36 N. J. L., 72, there is an observation which illustrates this point, expressed in the following language:

"The will of the legislature must be expressed in the form of a law, by their own act. If it is left to the contingency of a popular vote to pronounce WHETHER IT SHALL TAKE EFFECT, *it is not the will of the law makers,* but the voice of their constituents that molds the rule of action. If the vote is affirmative, *it is law;* if it is negative, *it is not law.* The vote makes or defeats the law, and thus the people are permitted, unlawfully, to resume the right of which they have divested themselves by a written constitution; to declare by their own direction what action shall be law."

When, under the Beal law, the sale of intoxicating liquor is prohibited, it is not because the legislature willed it. The statute nowhere says it is the will of the legislature that such sales shall be prohibited, before the voters declare their will. It does say that it shall be unlawful in a municipality, when a majority of the electors thereof have willed that it shall not be done in their municipality. It is obviously the will of the voters that stamps the act as unlawful. It is an abuse of terms; it is turning Section 4364-20*b* upside down, to affirm that the will of the legislature determines that the sale of liquors shall be prohibited, or, which is the same thing, unlawful. It is the will of the voters.

THE CONDITION OR CONTINGENCY THEORY.

In the Gordon case (46 Ohio State Reports, 607), it is true, Judge Dickman said that the legislature *may order "the conditions or contingencies upon which laws are to be carried into effect;"* that it may "provide for preliminary action before a law is executed;" that the local option law of 1888, which, mutatis mutandis, is like the Beal law, was "a law to prohibit the sale of intoxicating liquors upon the contingency, that a majority of the qualified electors of a township shall vote against the sale;" and that it was, nevertheless, a valid law.

So, Judge Scott said, in Peck vs. Weddell, 17 O. S., 271, that a valid law can be made to "operate upon the happening of certain contingencies."

But when these eminent judges delivered these utterances, they were only considering and determining whether the statutes in question violated Section 1 of Article 2 of the constitution. The question, whether they infringed the second clause of Section 26 of Article 2 was not agitated by counsel in those cases, or considered by the court.

By Judge Dickman's opinion it can be demonstrated that the Beal law is a violation of that clause. That clause forbids the passage of an act *"to take effect upon the approval"* of the electors. Designating the approval as a condition or contingency, or as "preliminary action," does not save the statute from condemnation.

When the General Assembly enacts that a statute shall be "carried into effect," on the condition that the voters vote to have it done, or that, "before it is executed," the voters shall declare in favor of it, it, plainly and palpably, does what this clause of the constitution forbids. In either instance, it has simply made the statute take effect upon the approval of the

voters. There is, we respectfully submit, no escape from this conclusion.

The theory of the other side is that the legislature, by the Beal law, gave the voters of municipalities the power to determine when the contingency shall arise under which the sale, etc., of intoxicating liquors shall be prohibited, and be unlawful. Notwithstanding this, it, in effect, gives the voters the power to make the law and at the end of two years to "unmake it" and to "revive" suspended laws. This is true, because the contingency which the voters are empowered to determine is the very contingency which it is the exclusive function of the legislature to determine. In the enactment of every law, the legislature must, necessarily, determine a contingency. The contingency is whether the law shall have one given effect, or some other effect. But this law, here in question, transfers the determination of this contingency from the legislature to the voters. It is not its purpose to allow the voters to determine whether the majority shall vote for prohibition or against it. Its purpose is to let them determine that which is expressed in the ballot, namely, whether selling, etc., intoxicating liquors for a beverage shall be prohibited and be unlawful in the municipality, and whether the general laws in that municipality shall be suspended and the Beal law substituted. But it was the duty of the legislature to determine that contingency. That determination is essential to legislative action. Without such determination, the legislature could not execute its function of law making. Not having made that determination, in this instance, it did not legislate.

The Beal law is *not* an enactment that a statute may be *carried into effect* upon the happening of conditions or contingencies. It is no law at all (except to petition and hold an election) until the condition or contingency provided for shall happen. This is a distinction which has been ignored.

That contingency, we insist, is one which should have been determined by the legislature itself. The act, as it came from the legislature, *did not make it unlawful to sell intoxicating liquors in municipalities.* It provides that it shall be unlawful in each municipality *when* the majority of the voters there have first decided that it shall be prohibited or shall be unlawful. This is the prohibition of the statute—an essential part of it as a criminal statute. But the prohibition is enacted by the voters, not by the legislature. True, the voters derive their right to petition and to vote, and the council derives its power to order and hold an election, from the act, and nowhere else. *The point pressed is, that the legislature did not prohibit the sale of intoxicating liquors.* It is *not* prohibited until the majority of the voters first give their approval to the prohibition. But that is the very thing which the constitution inhibits the legislature from doing.

If the condition or contingency upon whose happening the law shall take effect or be executed, is the approval of the law itself, or of its provisions, by the voters, as it is, it is a plain violation of the last clause of Section 26 Article 2.

It does not cease to be a fact that the law is made to take effect upon the approval of the voters, by the mere designation of the approval as a *condition or a contingency.* If the execution of the statute is made dependent upon the approval of the majority of the voters, it is, in effect, making it take effect upon that approval, and it is thus an evasion of the plain prohibition of the constitution.

THE BEAL LAW GIVES THE VOTERS POWER TO REPEAL THE OLD LAW.

Every new law, either confirms or modifies something in the existing law.

Bishop's Written Laws, Sec. 5.

Prior to the passage of the Beal law, in municipalities which have accepted it by vote, and up to its acceptance, it was not unlawful to sell or give away intoxicating liquors, except to minors and to intoxicated persons. That was the old law. If it was desirable to *change the old law, the responsibility and duty of changing* it rested upon the legislature.

How can the legislature, in advance of receiving knowledge as to what the voters of a municipality determine, enact that the old law shall be modified or repealed, as the majority of the voters determine?

The general assembly left it to the voters to determine what *its* will should be, and to modify and repeal the old law, as it were. It, in effect, said to the voters, "Whatever your will shall be, that will be our will—the legislative will." If the majority of the voters shall decide that there shall not be sales or giving away of liquors for beverage, borrowing the language of the judge in the Morris case, it "defeats" the law; if the majority decide that there shall be prohibition, it "makes" the law, in their municipality. In this way, the people, in that locality, resume the exercise of the power which they transferred to the legislature, and that, too, without any amendment to, or modification of, the constitution; and the legislature abdicated the power which was specially confided to it by the constitution.

A LAW IS A COMMAND OF, AND HAS BINDING FORCE GIVEN TO IT, BY THE LEGISLATURE.

Bentham defined legislative power as the "power of command." Under the Beal law the majority of the voters issue the command. The command is not given by the legislature.

By the Beal law the legislature requires the approbation of the voters of the municipality, before the law, in its creation of a crime, is given its binding force. It does not issue a com-

mand to the people to obey the law, until after that approval is obtained. In substance, and in effect, the legislature says to the people of the municipalities: "We enact that the sales and giving away of intoxicating liquors shall be prohibited in your municipality, or they shall not be prohibited, whichever way you deem best; or if you have tried it, for two years, you may suspend or repeal the law for your territory, if it be contrary to your will or wish; it is for you to say which shall be the rule."

The law has no legal vitality till the voters breathe into it the breath of legal vitality, and, after once brought to life, they may knock the breath out of it, by a second election, at the end of two years.

THE BEAL LAW GIVES THE VOTERS POWER TO SUSPEND AND REPEAL THAT LAW.

At any time after two years from the date of an election, in any municipality—a second election, after petition, as before, may be held. If, at the first election, the decision was in favor of prohibition; and, if at the second election, it should be against prohibition, the result would be that the law would be suspended for the next two years in that municipality, or it would be repealed till another vote in favor of making sales, etc., criminal is taken, which, however, cannot be taken before the next two years.

Section 4364-20*h*.

The legislature had no power to delegate to the voters the legislative functions of suspending and repealing laws. Art. 1, Sec. 18 of constitution.

Section 4, of article 4, of the Constitution of the United States is violated by the Beal Law.

The Beal law in so far as it enacts that the votes of the electors of a municipality shall determine whether a law shall

go into effect is repugnant to section 4 of article 4 of the United States Constitution, which ordains:

> "THE UNITED STATES SHALL GUARANTEE TO EVERY STATE IN THIS UNION A REPUBLICAN FORM OF GOVERNMENT."

And, if the state constitution authorized the passage of that law, it is, also, for the same reason, unconstitutional.

A republican form of government means a *representative* government. A *representative* government does not mean a *pure democracy*. The former signifies a government by delegation; the laws are made by delegates of the governed. The latter signifies that the people, the governed, directly enact all laws, or, in other words, perform all the functions of government, legislative, executive and judicial, without the intervention of agents or delegates.

Madison defined a republic in this way. Federalist, Vol. 1, page 210; Nos. 43 and 44.

Judge Cooley defined a republican form of government, thus:

> "By republican is understood a government by representatives chosen by the people;" * * *." Cooley's Constitutional Law, 202.

Calhoun agrees with Cooley, for he said:

> "The constitution and government (of the United States) rest, throughout, on the principle of the concurrent majority * * * it is, of course, a *republic*, a *constitutional* democracy in contradistinction to an *absolute democracy;* and * * * the theory which regards it as a government of the *mere numerical majority* rests on a gross and groundless misconception." Calhoun's Works, Vol. 185.

Bouvier's definition is couched in the following language:

> "A form of government where the powers of the sovereignty are delegated to a body of men elected from time to time, to examine them for the benefit of the whole nation." 1 Bouvier's Inst., n. 31.

This court has spoken on the subject, thus:

> "The guaranty is of a republican form of government. No particular form of government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily casts the duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all, the people participated to some extent through their representatives elected in the manner specially provided. These governments, the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus, we have unmistakable evidence of what was a *government, republican in form, within the meaning of that term as employed in the constitution.*"
>
> Minor vs. Happersett, 21 Wall., 162.

To prove that we are not relying upon any partisan view of the constitution, we call attention to the fact, that on February 3, 1863, in the midst of the heat and passion of the civil war Mr. Dawes, chairman of the committee of elections of the house of representatives, made a report, from which we quote the following:

> "Representation is one of the very essentials of a republican form of government, and no one doubts that the United States cannot fulfill this obligation without guaranteeing that representation here." Bartlett's Digest Election Cases, page 446.

Mr. John Randolph Tucker has stated the doctrine in vigorous language:

> "Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in law making. It is the only practicable way by which a large country can give expression to its will in deliberate legislation. Give suffrage to the people, let law making be in the

> hands of their representatives, and make the representatives responsible at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights, and dismiss those who, upon trial, will not. *True Representation* is a security against wrong and abuse in law making."
>
> Tucker's Constitution of the United States, Vol. 1, 87.

If the Beal law authorizes the voters to enact law, to legislate, as it clearly does, and, if the state constitution warranted its enactment, they constitute an infringement upon the guaranty of section 4 of article 4 of the United States Constitution. In the localities where the voters determine what the law shall be, there, necessarily, is not a republican form of government; it is a pure democratic form of government. A state has no more power to violate that guaranty by a statute, than it has to do it by its constitution; and whenever it does this either way, the Federal government is obliged to intervene and correct the wrong.

Judge Cooley, discussing this phase of the question, said:

> "The power of the people to amend or revise their constitution is limited by the constitution of the United States in the following particulars: It must not abolish the republican form of government, since such an act would be revolutionary in its character, and would call for and demand direct intervention on the part of the United States."
>
> Cooley's Constitutional Limitations, page 42 (Fifth Edition).

Again Cooley said this:

> "Even in strict accordance with the forms prescribed for amending a state constitution, it would be possible for the people of the state to effect such change, as would deprive it of its republican character. It has been suggested that it would then be the duty of congress to intervene. In any case there could probably be no appeal from the decision of Congress." Cooley's Constitutional Limitations, 196.

Section 4 of Article 4, of the United States, being part of the "supreme law of the land," all of the judges of the state courts are enjoined to maintain and uphold it, and to adjudge that every constitutional provision adopted by their respective states and every statute enacted by their respective legislatures, which infringe upon its provision, is null and void; and they obligate themselves by oath to obey this injunction.

Article 6, of the Constitution.

It is no answer to all this to say that the legislature of the state is not robbed of its legislative power on other subjects. To make the government republican in form, the legislature must possess and exercise *all, not part,* but all, of the legislative power. "All legislative power" is the power to make all laws or any laws.

The duty of the general government to furnish, to guaranty, a republican form of government, necessarily implies a duty on all the states to have such a form of government. Every state must have a republican government; and, if at any time, a state is destitute of one, the general government is obliged to provide it.

A republican form of government, we insist, does not mean that a portion of the legislative power may be exercised by the people, through their suffrage, for a despot might, if he chose, call for the suffrages of his subjects, every month of the year, in regard to important measures or laws. It does not mean that a portion of the executive power remains with the people, to be exercised by suffrage, the only way in which they can exercise sovereignty; because that may be done under the most despotic government. Nor does it mean that a large proportion, or the whole, of the people have the election franchise; for a despot may grant universal suffrage.

Nor does it mean that the government was originally established by the voluntary agency of the people. A republican

form of government may have its beginning in the determination of a despot or of a monarch; or it may be built upon precedent. The best pattern for a republican form of government is the National government. It means, therefore, a government provided for by a written constitution; a government divided into three departments, executive, legislative and judicial, with the legislative sub-divided into two branches; a single executive, and the powers of government exercised by delegation, by representatives, agents of the people.

EQUAL PROTECTION OF THE LAW.

The distinctive and characteristic feature of the Federal Constitution and our whole system of jurisprudence is equality before the law. It appears in the fundamental historical documents and in all the arguments and in our revolutionary war records that so far as government is concerned "That all men are created equal." The Union was established upon this principle. Justice Brewer in the case of Magoun vs. Illinois Trust and Savings Bank, 170 U. S. 283, 301, aptly expressed it in the following language, "Equality in right, in protection and in burden is the thought which has run through the life of this nation and its constitutional exactments from the Declaration of Independence to the present hour." In proposing the fourteenth amendments its framers pointed out that equality although "The very spirit and inspiration of our system of government, the absolute foundation upon which it was established," was no where adequately secured, and that it had, in many instances, been denied by the state, and they urged the adoption of this clause which would guarantee equality in the future. Cong. Globe, 39th Cong. first session, 2961. The federal congress interpreting this clause we think expressed the principle that is equally applicable to residents of cities and

villages and owners of homes and non-owners of homes, railroads and private persons in section 1977 R. S. U. S. "All persons within the jurisdiction of the United States shall have the right in every state and territory to make and enforce contract, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exactions of every kind, and to no other." So we say in the case at bar, that the relator should suffer like penalties and punishments with every other citizen, subject to the state sovereignty and "to no other." Mr. Justice Bradley, speaking of this clause, in the case of Missouri vs. Louis, 101 U. S., 231, said:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called *the police powers of the state*, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the constitution was ordained. But as the constitution of the United States is the supreme law of the land, anything in this constitution or statutes of the states to the contrary notwithstanding, a statute of the state, even when avowedly exacted in the exercise of its police powers, must yield to that law. No right granted or secured by the constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution *is the supreme law.*" The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety, but if, by their necessary operation, its regulations, looking to either of those ends amount to a denial to persons within its jurisdiction of the *equal protection of the laws*, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23, 73; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243, 247; Missouri, K. & T. R. Co. v. Haber, 169 U. S., 613, 626, 42 L. Ed. 878, 883, 18 Sup. Ct. Rep., 488."

In the 184 U. S., 540, this court says:

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court, and of the highest courts of the states will show.

It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means *"that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."* Missouri v. Lewis, 101 U. S. 22, 31, sub. nom. Bowman v. Lewis 25 L. Ed. 989, 992. We have also said, "The fourteenth amendment, in declaring that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, *and that in that administration of criminal justice no different or higher punishment should be interposed upon one than such as is pre-*

scribed to all for like offenses.. Barbier v. Connolly, 113 U. S., 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in Yick Wo v. Hopkins, 118 U. S., 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1070, *in which it was also said that the equal protection of the laws is a pledge of the protection of equal laws.* In Hayes v. Missouri, 120 U. S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the fourteenth amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed. Due process of law and the equal protection of the laws, this court has said, are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. Duncan v. Missouri, 150 U. S., 377, 382, 38 L. Ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live stock raisers, in respect of their products and live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, *would be a crime against the state* The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturists and raiserso f live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such

regulations, applicable alike to all in like conditions, as the state may legally prescribe.

The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such bases * * * . But arbitrary selection can never be justified by calling it classification. *The equal protection demanded by the fourteenth amendment forbids this* * * * . *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.* * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." Gulf, C. &. S. F. R. Co. v. Ellis, 165 U. S., 150, 155, 159, 160, 165, 41 L. Ed. 666, 668, 670, 671, 17 Sup. Ct. Rep. 255, 257-259, 261. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co., 183 U. S., 79 sub. nom. Cotting v. Godard, ante. 92, 22 Sup. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the fourteenth amendment in that it denied to the company the equal protection of the laws.

Attention has been called to the cases of Magoun v. Illinois Trust & Sav. Bank, 170 U. S., 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594, and American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. Rep. 43; and it is supposed that the grounds upon which the decision of the present case is placed are inconsistent with the principles announced in those cases. We do not think so.

In Magoun v. Illinois Trust & Sav. Bank we held that the progressive inheritance tax law of Illinois of June 15, 1895, was not in conflict with the constitution of the United States by reason of the fact that the amount of the tax was determinable by valuation so that every person and corporation should pay in proportion to the value of his, her, or its property inherited. The classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified according to amount and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class. Such classification was held not to be inconsistent with the fourteenth amendment.

In Sugar Ref. Co. v. Louisiana we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the protection of th laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the business of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class: "The power of taxation under this provision was fully considered in Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, in which it was said to not have been intended to prevent a state from

changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framiing their constitution." Again: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporation engaged in a general refining business the equal protection of the laws."

The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those *cases had reference to the taxing power of the state*, and involved considerations that could not in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. *A state may, in its wis-*

dom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of United States, so long as the classification does not invade rights secured by the constitution of the United States. *But different consideration control the state, by legislation, seeks to regulate the enjoyments of rights and the pursuit* of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes an *make criminals* of one class if they do certain forbidden things, *while allowing another and favored class engaged in the same domestic trade to do the same things with impunity.* It is one thing to exert the power of taxation so as to meet the expenses of government; and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within the jurisdiction shall be exempt from the operation of *a general statute making it criminal to do certai nthings connected with domestic trade or commerce.* Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the txing statutes of a state. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land. We only need to say, in this connection, that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws.

Other cases have been cited, but they are equally inapplicable in the present discussion, and only serve to show the extent to which the police powers of the states may be exerted without infringing the Federal Constitution.

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combination may, for their benefit exclusively, control or establish prices, *are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful.*. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition among themselves or others in the sale of their goods or merchandise; but their neighbors who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that state.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or com-

merce *shall be deemed criminals* if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class *shall not be bound to regard those regulations, but may combine their capital*, skill, or acts to destroy competition, and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in questoin embraces by its terms all persons, firms, corporations, or associations, of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products, or stock in hand. Looking, then, at all the section together, we must hold that the legislature would not have entered upon or con-

tinued the policy indicated by the statute unless agriculturists and live stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section. Whether it is also within the prohibition against the deprivation of property without due process of law is a question which it is unnecessary to consider at this time."

ARGUMENT.

I.

This is a complaint by one deprived of his liberty under the provisions of an *alleged criminal law* and not of a *civil law* of the State of Ohio. It is a law based upon a classification for *crime* or for *criminal punishment* and not a classification for *taxation* or for *civil purposes*. It must be at all times construed with the understanding that under schedule, section 18, of the constitution of Ohio, this state can never be a "licensed liquor law" state.

We start with the proposition in the sale of intoxicating liquor that under the Ohio constitution, "The general assembly may provide by law against the evils resulting therefrom." That whenever the general assembly undertakes to make the sale or the giving away of intoxicating liquor a "crime by law" such law must be a *general law in Ohio* and operate upon *all citizens equally* and afford equal protection under general laws, whenever such a rule of conduct is to be punished as a *crime*.

If the relator is to have the equal protection of the laws under the constitution, he cannot be punished under a liquor

local option law, nor under a license law, made criminal by its provision, as a method of enforcement.

Marmet vs. State, 45 O. S., 63.
State vs. Hipp, 38 O. S., 199.
Buzmann vs. Whitbeck, 42 O. S., 223.

Relator was a citizen of Ohio, living under such a constitutional provision. Inasmuch as *all other criminal laws* in order to be valid must have a *uniform operation throughout the state,* the relator could demand that his rights be measured under the broad provisions of the fourteenth amendment, that he also was entitled to the equal protection of equal laws. Whenever the state undertakes to define and punish "crime" it must define "crime" by the same process of legislation *for all,* to wit, *by laws uniform throughout the state and by general laws throughout the state.*

Judge Scott in case of Kelly vs. State, 6 O. S., 260, construing Art. 2, section 26 of the constitution, said "it is a general, unqualified and positive prohibition or limitation of legislative power, forbidding the giving of a partial operation to any law of a general nature or in its own affirmative terms, requiring that a uniform operation throughout the state shall be given to all laws of a general nature," see the principle further enlarged upon and emphasized in Falk ex parte 42 O. S., 638.

State vs. Powers, 38 O. S., 54, 63.
McGill vs. State, 34 O. S., 228.

"Nor can it be maintained that because the act is local in form, it must be presumed that there was some sufficient local necessity for its enactment for that would totally defeat the provisions of the constitution."

State vs. Ellett, 47 O. S., 93, 94.
State vs. Winch, 45 O. S., 663.
Nye vs. State, 1 C. C., 355.

The constitutional convention of 1851 in Ohio, gave all citizens this guaranty as to their liberty, to wit, that no one in

Ohio could be arrested or convicted of a crime of whatever nature in any part of the state without the legislature first passing a law of uniform operation throughout the state, defining "crime" or for "punishing crime."

Crime is of the same nature in every part of the state, and this relator is entitled to the same *conditions precedent* in the matter of legislation in this behalf as every other citizen is in this behalf.

"Crime," by whatever name it may be called, or however it may be defined by an act of the general assembly, will be of the same nature in every part of the state. An act without words of limitation, defining and punishing a designated crime or misdemeanor would necessarily be a law of a general nature, applicable to the designated crime or offense, wherever within the state it may have been committed.

The general assembly would have no power to make murder, as defined in the first section of our crime act, punishable with death in one county, and imprisonment for life in another, for the crime being of the same nature, everywhere, the law defining and punishing it would ncessarily be of a general nature, and therefore within the operation of the first clause of section 26, article 2.

"The same must also be the case in reference to acts of the general assembly, defining and punishing larceny, or any other crime or offense. If one county could be excepted from the operation of such a law, then two, or any other number of counties might be, and the right to exempt would imply the power to pass a special law, differing from all others for each county in the state."

Ex parte Van Hagan, 25 O. S., 431.

"The fourth section attempts to create misdemeanors by provisions peculiar to Cuyahoga county. And the provision that "all persons found violating the provisions of this section or any of the rules or regulations or ordinances adopted by any such board or the city council shall be punished on conviction," etc., can hardly be construed otherwise than as an attempt to

delegate to the board authority to define misdemeanors. Perhaps no laws are more commonly regarded as general than those which define and punish crimes and misdemeanors. But added exposition of the subject cannot be necessary in view of the former decisions."

State ex rel. Sheets, vs. Cowles, 64 O. S., 182.

II.

If under the fourteenth amendment of the Federal Constitution, no state can deprive the relator of the equal protection of the laws or the protection of equal laws, and if that protection extends in the highest degree to the personal freedom of said relator in the matter of arrest and imprisonment for crime, then we beg leave to submit the further proposition to this court, to-wit, that the judges of every court of Ohio being bound by article VI of the Federal Constitution to observe the fourteenth amendment "anything in the *constitution* or laws of the state to the contrary notwithstanding," must construe even the constitution of Ohio in harmony with the provisions of the fourteenth amendment and give it an equal operation and equal protection to all its subjects.

The judges of the Supreme Court of Ohio, have heretofore held for the due enactment of all general laws, including criminal laws, that the legislature was without the power of the "referendum," that for every other definition of crime and for every other punishment of crime, except the punishment of selling intoxicating liquor as set forth in the "Beal Law" and in the townshop local option law, the general assembly was without the power of the referendum to validate or give force or life to a law. State vs. Garver, 66 O. S., 555.

If our contention be right, neither the legislature nor the courts have the right to make an exception to these constitutional provisions and deprive one of his liberty or to punish him

for a crime that is created by the vote of a municipality under the provisions of this act. If every other crime is defined and made punishable by the legislature, can the legislature make an exception of this class of criminal acts and delegate the power to the municipality to put the act in operation? Is the relator afforded the equal protection of the laws when the legislature abdicates its functions as legislators and delegates its powers to the electors, and only a selected few of the electors residing within the municipal boundaries? And vesting such electors also with the powers to recall or revoke the law at a second election?

Every other citizen charged with any other statutory crime has the offense defined and created by the general assembly and not by the electors of the state or of certain municipal boundaries.

If any criminal law can be made effective by the referendum, then all criminal laws should be made subject to the electors will as to their "taking effect." There should be equal operation of the constitutional law as well as equal operation of statute law, when human liberty is being affected.

III.

The most flagrant violation of the fourteenth amendment and the last clause and Section 2 of Article 1 thereof in this legislative act under discussion as appears in the "tenth" assignment of error (Record page 5). The chief justice has certified this ground of error to this court, to determine whether the act of May 12, 1902, passed after the Beal law of April 3, 1902, exempting certain foreign and domestic corporations and their employes from the operation and effect of said criminal and civil provisions, did or did not conflict with the Federal Constitution in this behalf. As the court takes judicial knowledge of the statutes of Ohio, we have produced these two laws in full

as an appendix for convenience. By reason of the supplement to said section 4394-9 passed subsequent to the Beal law, the B. & O. Ry. Co. and the Pennsylvania Ry. Co., non-residents, by paying from three hundred and fifty dollars ($350.00) to seven hundred dollars ($700.00) annually, a tax as herein provided, can sell with impunity intoxicating liquors the full length of their lines, and thus within the territory of Cambridge. That by reason of these privileges granted and extended to said railway corporations and to their passengers, their porters, servants and employes to so buy, sell and give away intoxicating liquors in buffet and dining cars upon their said trains within said municipality of the "city of Cambridge," in the same way and at the same time and place that is made punishable as a criminal offense to others, does not afford to said accused the equal protection of the laws that is afforded the porters, servants and conductors of these foreign corporations, who pay the three hundred and fifty ($350.00) dollars or seven hundred ($700.00) dollars.

Neither does it entitle him to the immunities of the citizen of Maryland (B. & O. Co.) of Pennsylvania (The Pennsylvania Company), who can do these same acts without punishment. It is not a reasonable classification for crime, even if it be a reasonable classification for taxation. A citizen in a Pullman car or buffet car has the same kind of an appetite and the same constructed brain and stomach, as the man sitting sixty feet away in a railroad street saloon or cafe. Human stomachs do not even enjoy the distinction of differing in color.

The difference in color of skin at one time prior to the fourteenth amendment was ground for "reasonable classification," but has long ceased to avail the hair splitting partisan, by reason of the plain provision of the fourteenth and fifteenth amendments.

Of like infirmity is the provision of the Beal law that grants certain immunities from criminal prosecution of citizens within said "dry" territory who "give away" intoxicating liquor *in their own houses as set forth in the "sixth" assignment of error,* being the latter part of section 4364-20c.

It is a crime for the *guest to give to the host,* but not a crime for the *host to give to the guest.* It is a crime for a person not owning a house to give away intoxicating liquor, while it is not a crime for such home owner. Is not this classification "for purposes of crime" gone mad? By the further provision of said act, all citizens outside of Cambridge, in said Guernsey county can give away, buy or sell intoxicating liquors, without violating the criminal provisions of this act, and yet all of these non-residents of municipalities are residents of the state of Ohio. If the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states "surely all the citizens of the municipal and non-municipal territory of the same state," when it seeks to define *"a state crime"* and punish *a state crime,* ought to be on the same footing. Crime is an offense against sovereignty. And sovereignty is everywhere within the state's limits. Why can an imaginary boundary line condone an offense against sovereignty within her own boundaries?

Under the provisions of this act the same citizen will offend the sovereignty by violating this law in Cambridge, Guernsey county, and on the same day do the same act in the same county in any other city or village of the county, or in the rural districts of the county and not be a law violater or an offender against sovereignty.

Or three citizens of Guernsey county, one a citizen of the city of Cambridge and one a citizen of an adjoining city in said county and one a resident of the rural district, can each do the same act at the same moment of time, namely, all give away

a glass of beer or ale or wine, and in the first case, citizen number one will have offended against the state, will have offended the sovereignty; the latter two citizens will not offend the same sovereignty or the same state; citizen number one will be sent to the grand jury and to jail or to the work house; citizens number two and three can in the same county go before the same grand jury and admit doing the same act in the same county at the same time and exactly in the same way, and this same grand jury under this Beal law will be compelled to discharge citizens number two and three as innocent, and guilty of no offense against the same sovereignty. Citizen number one will be sent to a work house to serve out his sentence under officers and guards who may commit daily the same offense, while holding the accused for punishment and while punishing said accused and yet the prison officials cannot be prosecuted or punished under this law because the work house is not situated in Cambridge.

Is this the equal operation of the criminal laws upon all the citizens of Ohio within the meaning of the last clause of the 14th Amendment?

> Where particular persons are excepted from the operation of a general law, it destroys the uniformity of its operation, and of its equal protection, and equal benefits; the legislature cannot discriminate *or grant an indulgence to one which is not accorded to another.* The legislature cannot discriminate nor grant an indulgence, or grant immunity, or permit an act to be done with impunity by one person, which is not accorded another. Every general law must have a uniform operation; that is to say, it must operate equally, upon all persons and upon all things, upon which it acts at all. Omnibus Co. v. Baldwin, 57 Cal., 165; French vs. Teschemaker, 24 Cal., 544; State vs. Ellet, 47 O. S., 90; Coal Co. v. Rosser, 53 O. S., 23; Ry. vs. Gilmore, 8 C. C., 658.

IV.

JURY OF THE VICINAGE.

Since the passage of the 14th Amendment and the construction recently given to the equality clause, we contend further, that the relator was not on equal terms with all other accused of crime, in this, to wit: That under article 1, section 10 of the Ohio Constitution every other criminal under every other criminal law and every other one charged with crime is guaranteed "A speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." And by article 1, section 5, the "right of trial by jury shall be inviolate." This section was construed by the Supreme Court of the State of Ohio for all other persons charged with crime in the case of Cooper vs. State, 16 O. S., 328. "The right of the accused to an impartial jury can not be abridged. To secure this right it is necessary that the body of triers should be composed of men indifferent between the parties and otherwise capable of discharging their duty as jurors * * * this duty is enjoined by the Constitution and it is true can not be impaired or the right abridged by legislative action."

In the case at bar it is the only crime punishable by jurors selected from territory *without the boundaries or district wherein the crime is and can be committed.* The record shows that the very small territory of Cambridge, one-fiftieth of the whole county, is not a jury district from which to select either the grand jury or the petit juries, but accused is bound over to the grand jury of the whole county, which grand jury under the State Constitution and Statutes is selected from the whole county, and every juror and grand

juror who sits in judgment upon the accused for any other crime has the qualification of being selected from the vicinage, he is a peer. To be a peer he must be of like condition and equality in the state; such grand juror and petit juror, must be capable of committing a like crime and suffering a like punishment and liable to a like disgrace, if he, the juror, should commit a similar offense. Would the accused be upon equal footing with all other accused of crime in the State of Ohio and be given a constitutional jury, a trial by his peers under the present, special law set forth in this statute, wherein the jury is selected both petit and grand jury from non-criminal territory? These jurors sitting in judgment upon the accused could not themselves be charged or found guilty of buying, selling or giving away a glass of beer, cider or wine, although they were residing in the same county but in the non-criminal territory in said county they are not upon equality with the accused. The grand jurors and the petit jurors are as foreign to the criminal district of the municipal boundaries of Cambridge as the jury from Indiana would be sitting in Ohio. These jurors are civilly nerveless and heartless sitting in judgment upon a man with sensibilities. They are civilly blind trying the accused of color blindness. They are civilly deaf trying the accused for boisterous conduct. They are civilly upon an inequality with the accused while every other accused is entitled to a jury and is afforded and given a jury of his peers with all that term implies. "The right to a jury of the vicinage imports only the trial jury trying a party, but the grand jury indicting him shall be of the vicinage or neighborhood."

Weyrich vs. People, 89 Ill. 90.

V.

THE JURY DISTRICT FOR ALL OTHER CRIMINAL TRIALS HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW.

The importance of these provisions has been repeatedly recognized by the federal courts interpreting federal rights and under the equality clause of the 14th Amendment we believe the court has a right to enforce this inviolate right that is accorded to every other accused except persons charged with the violation of this Beal Law, and therefore the federal courts will not suffer the unequal operation of the State law in this behalf. If the court was construing a purely federal act they would enforce these important provisions and invalidate any law infringing these rights. "An offense against the United States committed within the territorial jurisdiction thereof, must be tried within the state and district where committed." United States vs. Bird, 1 Sprague (U. S. District), 299.

The Constitutional requirements that the district "shall have been previously ascertained by law" means that it shall be so ascertained before the commission of the offense, upon which a party is held for trial in such district. United States vs. Maxon, 5 Blatch (U. S. Cir.), 360. The accused in the case at bar is tried by jurors outside of the district where the crime was committed, and by jurors that can never officially know of the effect of the commission of the crime. The jury district where every other crime in Ohio had been previously ascertained by law, and from the district wherein the crime was committed. We insist that if the constitutional provisions of Ohio are to be held inviolate and sacred for the protection of the liberties of all

other accused persons, whether citizens or aliens, these laws should be so held here. In every other criminal accusation against relator he is entitled to equal protection of equal laws constitutional as well as statutory.

We take the following extract from Justice Story and the Missouri Supreme Court to show how universal these rights are considered essential in the trial of all crimes.

"Sec. 1779. It seems hardly necessary, in this place to expatiate upon the antiquity or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta, in which it is declared, * * * no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, etc., but by the judgment of his peers or by the law of the land. The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, *being of the like condition and equality in the state*. When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.

Story on Constitution, Sec. 1779.

"The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard aganst the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims. But how difficult it is to escape from the vengeance of an indignant people, roused to hatred by

unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies? The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy. So long indeed, as this palladium remains sacred and inviolable, the liberties of a free government can not wholly fall. But, to give it real efficiency, it must be preserved in its purity and dignity, and not with a view to slight inconviences or imaginary burdens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to weild its potent armor. Mr. Justice Blackstone, with the warmth and pride becoming the English living under its blessed protection, has said: "A celebrated French writer, who concludes that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers *to the trial by jury*."

"It is observable, that the trial of all crimes is not only to be by jury, but to be held in the state where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends and witnesses and neighborhood, and thus to be subjected to the verdict of mere strangers *who may feel no common sympathy*, or who may even cherish animosities or prejudices against him. Besides this a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vincinage

of the *place where the crime was alleged to be committed.* This was certainly a precaution which, however justifiable in an early and barbarous state of society, is little commendable in its more advanced stages. It has been justly remarked that in such cases to summon a jury laboring under local prejudices is laying a snare for their consciences; and though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial. It was doubtless by analogy to this rule of the common law that all criminal trials are required to be in the state where committed."

Sec. 1789. The other part of the clause is but an enlargement of the language of Magna Charta, * * * (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words (by the law of the land) mean by due process of law, (2) that is, without due presentment or indictment, and being brought in answer thereto by due process of the common law. (a) So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."

Story on the Constitution, Vol. 2.

* * * "If, on the other hand, the people are enlightened and honest, and zealous in defence of their rights and liberties, *it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury.*"

Rawle on Const., Ch., 10, pp. 128, 129.
Story on the Const., Vol. 2.

In the language of the learned Story, the juror from Indiana could "feel no common sympathy" because, as he says in section 1779, he is "not one of like condition and equality in the state."

"2. Statutes—Validity of—Section 1697, Revised Statutes, Determined—Case adjudged.—It appearing from the face of the indictment that the offense with which the prisoner stands charged was committed in Ray county, and the bill found by the jury of Caldwell, and the authority for this exercise of jurisdiction by the grand inquest of the latter

county being justified under the authority of section 1697, of the Revised Statutes (which provides that "when an offense shall be committed on the boundary of two counties, *or within five hundred yards of such boundary*,. * * * an examination thereof may be found, and a trial and conviction thereon had, in either of such counties.)" Held, that the bill of rights positively interdicts any other method of final procedure in cases of felony other than by *indictment*. That the indictment must be found *in the same county* where the offence was committed, and no man is to suffer criminally for what he does out of the territorial limits of the county. That said section 1697, of the Revised Statutes, is in violation of the constitution, and is, therefore, void, and that the prisoner is illegally detained and is entitled to his discharge.

19 Mo., App. Rep., p. 370.

"The very object of the writ in a case like this being to inquire into the cause and legality of the restraint, it must follow as an inevitable corrollary of jurisdiction that the officer or court issuing it must investigate and determine every question going to the constitution of the legality of the process by which the petitioner is detained. So extreme is the solicitude of the law, and so jealous of the liberty of the citizen are our constitution and statute, that it is made the imperative duty of the judge and court to hear his petition. And it has ever been recognized as among the unquestioned powers of the court or judge granting the writ to pass upon, primarily, the question as to whether the court or officer, issuing the process under which the prisoner is detained, had jurisdiction and has acted within that jurisdiction. Cooley Const. Lim., 425.

"However much, therefore, we may personally desire to escape the annoyance and responsibility of entertaining these applications which ordinarily should be addressed to the local tribunals, and of determing the many delicate and intricate questions raised by them we must obey the mandate of the constitution and the satute.

II. "It appearing from the face of the indictment that the offense with which the prisoner stands charged was

committed in Ray county and the bill found by the grand jury of Caldwell county, and the authority for this exercise of jurisdiction by the grand inquest of the latter county being justified under the authority of said section 1697, we must determine the validity or invalidity of this legislative act.

"The Bill of Rights, section twelve, article two, of the present state constitution, declares: "That no person shall, for felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

"As this fundamental law positively interdicts any other method of final procedure in case of felony than by indictment, by whom and the important question occurs: What is an indictment, by whom and how is it found? This question has been met and fully answered by the Supreme Court in Ex Parte Slater (72 Mo., 102). The term "indictment," as employed in the constitution, *is held to mean its common law acceptation*. That meaning is well defined and understood. Without reviewing the authorities, or re-stating the reasoning it is enough to say that the common law authorities, from Bacon's abridgement to our latest text writers, define such indictment to be, "an accusation at the suit of the king (or state) by the oaths of twelve men * * * of the same county *wherein the offence was committed*, returned to inquire of all offences in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true." And, therefore, by the common law the grand jury can not regularly indict or present any offence which does not arise within the county or precinct for which they (the grand jury) are returned, and therefore, it is a good exception to an indictment that it doth not appear that the offence arose *within such county or precinct*." 5 Bacon's Abridgement, 61.

"The common law of England provided no tribunal for punishing what was done out of the county in which the court sat. The general proposition, therefore, is that no man is to suffer criminally for what he does out of the territorial limits of the county." 1 Bishop Criminal Law, sections 109-110.

"So Norton, J., in Ex Parte Slater, construed section twelve, of article two, of the state constitution, as if it read:

"No person shall, for a felony, be proceeded against criminally, otherwise than by indictment, that is, otherwise than by an accusation at the suit of the state, by the oath of nine men (at least, and not more than twelve) in the same county wherein the offence was committed, returned to inquire of all offences in general, in the county determinable by the court in which they are returned, and finding a bill brought before them to be true."

"How then, is it legally possible to uphold an indictment which declares on its face that the grand jury returning it was not of the county in which the offence was committed? Nor am I able to distinguish, in principle, the attempt made by the legislature in adopting section 1697 from that of section 1804, denounced in *Slater, supra*, as unconstitutional. The latter act undertook, under a certain contingency, to authorize the grand jury of a county, *different from that in which the offense was committed*, to return a true bill of indictment, and to try the offender. So does section 1697. They are both legislative expedients, resting upon the mischievous doctrine of *ab inconvenienti*, to prevent, as the legislature supposed, a failure of public justice in exceptional cases. But the answer of the supreme law of the state, as interpreted by its supreme judicial tribunal, is that under the *genius and letter of our institutions and written constitution, the personal liberty and rights of the citizen are paramount;* and, therefore, certain safeguards are erected for their security and preservation, which the legislature itself may not break through.

If the legislature may break over the county boundary five hundred yards, where shall it stop as the constitutional limit? What power shall the citizen appeal to, to say; thus far shalt thou go and no farther? What recognized rule, after it is permitted to go five hundred yards, would prevent it from going five miles, or twenty miles beyond the county line? The constitution says, the county lines constitute the boundary within which a grand jury may investigate the offence of this petitioner; but the legislature say, the grand jury may go over five hundred yards into an adjoining county, to indict, and the Circuit Court of the county other than that of the venue of the offence, may try and convict."

19 Mo. App. Rep., pp. 373, 376.

IV. "It has ever been esteemed as among our most valuable common law heritages to enjoy the right of trial

by jury. Sir William Blackstone pronounced it "the glory of the English law." This boon implies not only the privilege of trial *per pais*, but that this jury shall be of our peers, and come from the vicinage—our country—our neighbors. While the *situs* of the offence draws to it the venue, the law which in dealing with a principle always generalizes, proceeds upon the assumption that the citizen ordinarily moves and acts about his residence—his home. It has, therefore, ever been zealous to accord to him the privilege of a trial at home among his neighbors. So, in criminal prosecutions, while the privelege is usually accorded to the accused to take a change of venue, in order that he may escape local prejudice and passion, and to secure a fair and impartial trial, it does not recognize the right of the state to change the venue. Whereas, if the statute in question is valid, it is plain to be seen how the ancient privilege of the citizen in this respect may be stricken down by the state, and the state secure by indirection a change of venue. As not infrequently happens in the formation of our counties, four counties may abut. An offence committed in one of these counties could indict. The prosecution, which too frequently passes from the control and management of the public official hand, into those of private prosecutors, sometimes stimulated by private ambition and personal spite, could select for such prosecution that one most inimical to the accused and most inconvenient to his witnesses, and farthest removed, at the place of trial, from and least in sympathy with, his neighborhood and home influence, wrought, perhaps, by a hitherto unblemished reputation. * * * *

V. "It is suggested that a statute similar to this has been upon the satutes since 1845, and that this fact at least is persuasive proof that the legislature has always recognized this as a proper construction of the constitution, and that this fact must have been known to the framers of the constitution of 1875. *It might be a sufficient answer to this to say, that no usurpation by a legislative body is consecrated by time, nor can one invasion of the fundamental law justify its repetition.*

"Strangely enough there does not appear to have ever been any judicial discussion or construction of this statute. If it has, to any extent, been put into practice at *nisi*, it has not fallen under our observation; though it may have been used. The language of the corresponding provision of the constitution of 1820 is somewhat peculiar, and I

think not so broad and significant as that of 1875. Section nine, article thirteen, of constitution of 1820, simply declares that, 'in prosecutions on presentment or indictment' (the accused has the right) 'to a speedy trial by *an impartial jury of the vicinage*.' It does not positively direct how felonies shall be prosecuted. It simply declares that in case of prosecutions by indictment, etc., the accused shall have a speedy trial, etc. This language was followed in the constitution of 1865. It was supplanted by that of 1875 in the language above quoted. This must be by indictment. This indictment can only be found by the grand jury, say the Supreme Court, of the county in which the offense was committed. This construction of the existing fundamental law is authoritative; and a sense of official duty and respect for the highest court of the state, compels us to accept and follow its interpretation.

VI. "It is finally suggested by respondent, that *ex necessitate*, the provisions of the constitution in question must be held to be more or less flexible, else the effect of the rigidity of our construction would be to strike down the provisions of section 1696, of the statute, which authorizes a prosecution of offenders on steamboats and the like, and on railroad trains, to be proceeded against in any county along which the navigable stream or railroad car passes or at the terminal point. That portion of the section which refers to offenses committed on navigable waters finds its precedent, doubtless, in the common law method of reaching such cases, while that portion of it respecting offences committed on railroad cars, which has latterly become such thoroughfares of travel, was assimilated by the legislature to the rule of offences committed on navigable waterways."

19 Mo., App. Rep., pp. 377, 379.

The importance of preserving the right of trial by jury inviolate—a jury of twelve men, the *peers* of the accused—a "jury" as so defined by the common law having all these elements attached thereto, appears in the Bill of Rights of twenty-seven states of the Union, in language as complete as that in the Ohio Constitution and Bill of Rights.

VI.

THE STATE MUST PROVIDE BY LAW A JURY OF DEFENDANT'S PEERS TO TRY HIM AND PRESERVE EVERY HISTORICAL ELEMENT OF THE INSTITUTION CALLED "A JURY" INVIOLATE.

Justice Christiancy in Hill v. The People, 18 Mich., on page 357, lays down the propositions governing legislatures when providing a jury for a criminal case in the following potent language.

"But a criminal prosecution in which the people in their soverign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding *in invitum*, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts, to hold that a defendant charged with a crime, might, without a trial, enter into a binding contract with the prosecuting attorney (representing the state) to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or *jury unknown to the constitution or the laws*, the result of which trial might be to place him in the same penitentiary.

"The true theory, we think, is that the people, in their political or soveriegn capacity, assume to provide by law the proper tribunals and modes of trial for offenses without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, *the panels of jurors* and *other safeguards for his trial, in accordance with the constitution which secures his rights.* The government—the officers of the law—bring the jurors into the box; he has no control over the

think not so broad and significant as that of 1875. Section nine, article thirteen, of constitution of 1820, simply declares that, 'in prosecutions on presentment or indictment' (the accused has the right) 'to a speedy trial by *an impartial jury of the vicinage.*' It does not positively direct how felonies shall be prosecuted. It simply declares that in case of prosecutions by indictment, etc., the accused shall have a speedy trial, etc. This language was followed in the constitution of 1865. It was supplanted by that of 1875 in the language above quoted. This must be by indictment. This indictment can only be found by the grand jury, say the Supreme Court, of the county in which the offense was committed. This construction of the existing fundamental law is authoritative; and a sense of official duty and respect for the highest court of the state, compels us to accept and follow its interpretation.

VI. "It is finally suggested by respondent, that *ex necessitate*, the provisions of the constitution in question must be held to be more or less flexible, else the effect of the rigidity of our construction would be to strike down the provisions of section 1696, of the statute, which authorizes a prosecution of offenders on steamboats and the like, and on railroad trains, to be proceeded against in any county along which the navigable stream or railroad car passes or at the terminal point. That portion of the section which refers to offenses committed on navigable waters finds its precedent, doubtless, in the common law method of reaching such cases, while that portion of it respecting offences committed on railroad cars, which has latterly become such thoroughfares of travel, was assimilated by the legislature to the rule of offences committed on navigable waterways."

19 Mo., App. Rep., pp. 377, 379.

The importance of preserving the right of trial by jury inviolate—a jury of twelve men, the *peers* of the accused—a "jury" as so defined by the common law having all these elements attached thereto, appears in the Bill of Rights of twenty-seven states of the Union, in language as complete as that in the Ohio Constitution and Bill of Rights.

VI.

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matter, who shall be summoned or compose the panel, upon which he may exercise the right of challenge; and the prosecution must see that electors only are placed there, as the law requires.

"But independent of all theories, and as a practical question, we think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself *in any way of the safeguards* which the constitution has provided him in the unanimous agreement of twelve men, qualified to serve as jurors by the general laws of the land (or a jury of his peers).

"Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that *every step taken* in that direction would tend to increase the danger. *One act or neglect* might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction.

"It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. * * * * * *."

"An indictment found by a grand jury composed of less than fifteen persons having the qualifications required by statute, is not sufficient to put the accused upon trial."

Doyle v. State, 17 Ohio Rep., 223.

"Section 3, 86 O. L., passed March 20, 1888 (Sec. 3231-3, Rev. Stat.), is void because in contravention of the constitution, in this, that it attempts to place a limitation upon the judicial power of the state. 1893, Creech v. Railroad Co., 11 Re., 764, 766 (29 Bull., 114).

"The modes of accusaion and preliminary proceedings leading to an arraignment should be regarded with the same strict rules as the law requires with respect to the method of trial. 1883, Gibbs v. State, 45 N. J. L., 379, 389 (46 Am. Rep., 782).

"Where the persons selected as grand jurors are not qualified to act as such, an indictment found by them is null and void and should be quashed, and the prisoner should not be indicted. De novo., 1868. Clare v. State, 30 Md., 163, 178.

"The failure of any member of the grand jury to possess each of the qualifications prescribed by the statute, viz., citizenship, housekeeper and over twenty-one years of age, renders indictments found by such jury subject to be set aside for a substantial error in the formation of the grand jury. 1874. Commonwealth v. Smith, 10 Bush. (Ky.), 476, 479.

"The jurisdiction to impanel a grand jury comes from the law and not from any order of the court; and where only a portion of a grand jury have been legally drawn, the body is illegal if an order has been made for summoning the remainder of the jury by an elisor, when the sheriff is incompetent. 1891. Bruner v. Superior Ct., 28 Pac. Rep., 341, 349. (92 Cal., 240, 264).

"A grand jury under the law as it now exists is defined to be a judicial court of inquiry, summoned and impaneled strictly in acordance with the provisions of the general law enacted for the purpose by the legislature; and any other body of men, however well qualified individually, would be neither a *de facto* nor a *de jure* grand jury, or entitled to perform the functions thereof. 1897. Eastham v. Holt, 27 S. E. Rep., 883, 893. (31 S. E. Rep., 259, 260; 43 W. Va., 599).

"The presence *of one disqualified person in the* panel of a grand jury vitiates the indictments found by it. Where a party indicted was neither in custody nor under bond when the grand jury which indicted him was impaneled, and had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement. 1875. United States v. Hammond, 26 Fed. Cas., 99, 100.

"The presence of *an illegal juror*, no matter how numerous the body may be, no matter if there be twelve good jurors remaining, vitiates the whole body and all of its acts and deliberations; the reason given for this being that this illegal juror may have been one of the twelve who voted for the bill, and that without him there might not have

been twelve jurors in favor of finding the bill. Iowa v. Ostrander, 18 Iowa, 455n.

"The presumption is that grand jurors are all residents of the proper county, and if the objection is made at the right time and in the proper manner, the non-residence of a grand juror indicting will disqualify and render invalid the action of the grand juror. Temporary absence will not disqualify, and in some states six months' residence with intention of becoming a citizen qualifies. State v. Russell, 28 L. R. A., 196n.

"An indictment found by a grand jury upon which a disqualified person is sitting is void. 1897. Eastman v. Holt, 31 S. E. Rep., 259, 260. (27 S. E. Rep., 883; 43 W. Va., 599).

"An indictment returned by a grand jury composed of more or less than the constitutional number, is void. 1885. Rainey v. State, 19 Texas App., 479, 483.

"An indictment found by a grand jury organized under an unconstitutional law should be quashed and a judgment of conviction founded thereon reversed. 1885. State v. Lawrence, 7 Pac. Rep., 116, 119, (12 Ore., 297).

* * * But if a grand jury *has even one disqualified person on its panel,* the whole jury is tainted, and an indictment founded by such a body would be void. 1873. United States v. Gardner, 25 Fed. Cas., 545, 554.

"An indictment found by a grand jury composed of less than fifteen persons, having the qualifications required by the statute, is not sufficient to put the accused on trial; and a plea to the indictment that one of the grand jurors had not the requisite statutory qualifications is a good plea in bar. Lan. Cr. Law., p. 78. In. Ib., p. 826n.

"Where the evidence clearly shows that the objection raised to a jury is vital in its character, and is not a mere matter of triviality or detail, but strikes at the foundation of the organization of the jury panel, it is pertinent as showing the invalidity of any indictment found by them. 3 Rice Ev., p. 203.

"The personnel of the grand jury must comply with the law in order to constitute a legal body; and any indictment found by a panel in contravention of the law is a mere nullity. 3 Rice Ev., p. 255.

"The defendant can not be prejudiced by his waiver of any statutory requisition in the prosecution of criminal offenses. Lan. Cr. Law, p. 922n.

"The essential and distinguishing features of the trial by jury, as known at the common law, and generally, if not universally, adopted in this country, were intended to be preserved, and all its benefits secured to the accused, in all criminal cases, by the Constitution of Ohio.

"It is beyond the power of the general assembly to *impair the right* or materially change its character. The number of jurors can not be diminished, or a verdict authorized, short of a unanimous concurrence of all the jurors.

"It follows that the act of March 14, 1853, defining the jurisdiction and regulating the practice of Probate Courts, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void.

Work v. State of Ohio, 2 Ohio St., 297 Syll.

"Whatever the right of trial by jury may consist in, in criminal cases, it is saved to "the party accused," in all cases alike, whether punishable capitally, by imprisonment in the penitentiary, by fine, or otherwise. Now, what is this *right*—in what does it consist? Is it an unmeaning, imaginary thing, possessing no definite, well-understood characteristics? Or, is it the contrary? What, according to the invariable usage in Ohio, prior to the adoption of our present constitution, was understood by the terms "trial by jury" in criminal cases; and what has always been understood to be their meaning throughout the United States, and wherever else the common law of England has prevailed? It is unnecessary to answer these questions at large; but it is well known that in Ohio, all trials by jury in criminal cases have been by a jury of twelve men. The people of Ohio, have no practical notion of any other number of men to compose a jury, and none other could have entered into the minds of the constitutional convention, in securing to the citizens this sacred right of trial by jury. It can not, in my humble opinion, ever be said, truthfully, that the framers of the constitution intended to confer on the legislature the power to alter the number of men required by the uniform practice of the country, to constitute a jury, by fixing a less number than twelve. And if a law were enacted fixing the number of jurors to try capital cases at *two, three, four* or *six* men, the whole community would de-

nounce it as unwise and unconstitutional. But why unconstitutional, when the constitution is silent as to the number of persons required to form a jury? I answer, simply because the language used in the constitution, although not specific as to the number of jurors, can not without violence to the universal understanding of the people, be so construed. The term "trial by jury," in so far as regards the number of men required to compose a jury, for the trial of issues of fact in courts of record, have by long use acquired a specific or technical meaning as well as a popular meaning—and this technical and popular meaning are in exact conformity, the one with the other. All men of experience and observation know that this is so; and it can not, consistently with candor, be denied by any intelligent person of mature years. The framers of the constitution had a right to suppose, and no doubt did suppose, that they had done and said all that was necessary by the language used in the constitution to protect the citizens of the state against being tried for their lives or their liberty by any other than a jury of twelve men. And they did not intend to leave this important question subject to be regulated or modified by legislative discretion or indiscretion. Nor did the constitutional convention, in providing for the security of this right, think it wise or expedient to discriminate between the crimes of different grades, as they did in regard to the form of accusation. On the contrary, care seems to have been taken to prevent any misapprehension of what was intended in this regard, to wit, to secure to parties "*accused*" in *all* cases, regardless of the nature of the crime or offense, the right to a speedy jury trial.

"We are bound, therefore, to conclude, that if it is competent for the legislature to provide by law, that persons accused of the offense of assault and battery may be required to submit to trial by a jury of six men, the same thing may, for the same reason, be required of persons accused of murder or other crime. And a further consequence must also follow, to wit, that if the legislature have the power to reduce the number of the jury to *six*, they may for like reason reduce it to any less number.

"It is no answer to this to say that there is no danger of this—that the legislature would not be guilty of so great an act of folly and injustice, etc. I ask, why not? If there is no advantage to the party accused, in having a jury of twelve men, it is surely great folly to burden the public with

the expense of keeping so large a body of men in attendance upon your courts. As a measure of economy, a jury of *two* good men would be preferred to *six* or *twelve*. But nobody would like to substitute a jury of *two* in place of twelve. Why not? Simply because there is a less degree of safety to the party accused. *Two* may be corrupted much more readily than *six*, or six than *twelve*. There is safety, also, against the influence of prejudice and passion in a body of twleve men, over six, or any smaller number. There is also a much greater degree of certainty that twelve independent minds, acting in concert in the investigation of a complicated state of facts, will, by one or another of them, seize upon all the materieal facts, than would a smaller number. So also with regard to the bearings and different views of facts; and when they all come to act together as one mind, and unite in one opinion as the result of their deliberations, the number twelve is altogether more reliable than a smaller number, of all other circumstances being equal. At the same time that a body of twelve men is, for these reasons, as a jury to try the facts in cases of all descriptions as they arise, not too numerous a body, it possesses obvious advantages over a larger body in several respects. It is not too numerous to admit of their agreeing upon a verdict, or to be onerously expensive for the purposes for which juries are called.

"It is true, no doubt, that very many cases arise to be tried by a jury in which one or two men would answer the purpose as well as twelve men. But such cases are distinguished by their peculiar circumstances more than by the particular offense. It is very easy to understand how questions of the gravest importance affecting the moral character and reputation for life, of an individual, may arise in cases in which the punishment is less than imprisonment in the penitentiary, and the *trial* involves a most complicated investigation of facts, and collaterally involving questions of most vital importance, such as the character and credibility of witnesses and the like. A man may be charged with petit larceny, and his character and hopes in life, or those of a worthy family, be blasted forever by an unjust conviction. It is true this may happen by a jury of twelve men before an enlightened court; but the *danger* is increased a thousandfold by a jury of six men and a court composed of men of the grade of intelligence, such as in many counties of Ohio, even now, have the honor to fill the office of Probate Judge. And it is greatly to be feared that time, with the operation of in-

ferior salaries, will speedily drive away all of those who now worthily fill the place."

Work v. State, 2 Ohio St., pp. 298, 300.

* * * "Two sections of the first article of the constitution are relied upon.

Section 5, provides: "The right of trial by jury shall be inviolate."

In section 10, it is provided: "*In any trial, in any court,* the party shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in this behalf, and a *speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed;* nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense."

By the first of these sections, the *right* of jury trial is recognized to exist, and its continuance unimpeached is provided for. By the last this right is declared to belong to every person accused of any crime or offense, in any court of the state.

"What then, is this right? It is nowhere defined or described in the constitution. It is spoken of as something already sufficiently understood and referred to as a matter already familiar to the public mind. The same article furnishes other examples of the same generality of expression. By section 8: "The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion, the public safety require it." In what does the privilege of this great bulwark of personal liberty consist? The constitution furnishes no answer, nor was it necessary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the habeas corpus stand as representatives of ideas as certain and definite as any other in the whole range of legal learning.

"The institution of the jury referred to in our constitution, and its benefits secured to every person accused of crime, is, precisely the same in every substantial respect as that recognized in the great charter and it benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty and property; the same brought to this continent by our forefathers and perserveringly claimed as their birthright, in every contest with arbitrary power, and finally, *an invasion of its privileges prominently assigned as one of the causes which was to justify them, in the eyes of mankind, in waging the contest which resulted in independence.* Nor did their affection for it then diminish or cool. They made it a cornerstone in erecting the state governments; and after the adoption of the federal constitution, without a provision securing it, they did not rest satisfied until they had proposed and carried an amendment, giving to every person accused of crime in the courts of the Union "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

"In the ordinance of July 13, 1787, which first extended civil government over the territory northwest of the river Ohio, it was made an unalterable article of compact, that "the inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury." Upon the organization of the state government in 1802, provisions, substantially the same as those in the present constitution were inserted in the bill of rights. It thus appears that persons accused of crime have, for every moment of time since civil government existed within the territory of this state by fundamental laws, been secured in the right of trial by jury. An institution that has so long stood the trying tests of time and experience, that *has so long been guarded with scrupulous care*, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it.

"It remains to consider what were the distinguishing features of this mode of trial as it existed at common law, and as it has always been known and used in this country. I do not propose to attempt to discover its origin, or to determine at what time, or by whom, it was first introduced into England. Able men, with all the information to be had, have differed upon it. The distinguished commentator up-

on the laws of England informs us that traces of it are to be found in the laws of all those nations which adopted the feudal system, "who had all of them a tribunal composed of twelve good men and true," and that "the truth seems to be, that this tribunal was universally established among the northern nations and so interwoven in their constitution that the earliest accounts of the one give us also some traces of the other." After delineating with admirable clearness the means the law has provided to secure the independence, purity and impartiality of the jury, and painting in glowing colors the many advantages of this mode of trial, this author proceeds to say: "Upon these acounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases. But this we must refer to the ensuing book of these commentaries; only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, *that he can not be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.* A constitution that, I may venture to affirm, has, under Providence, secured the just liberties of this nation for a long succession of ages."

"Pursuing the same subject in the fourth book of his commentaries, in its application to criminal prosecutions, he characterizes it as the bulwark of the liberties of Englishmen; and affirms that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, *must be confirmed by the unanimous suffrage of twelve of his equals and neighbors, and superior to all suspicion,* before the accused can be subjected to any manner of punishment.

"We have extracted somewhat at length from this eminent author, for the purpose of showing beyond controversy the number of the jury at common law, as well as the other essential elements of its constitution and action. The number must be twelve, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had.

"We might cite other writers to the same purpose, but it can not be necessary.

"We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the constitution of this state intended to perpetuate and make the safeguard of

innocence by securing its benefits to every person accused of crime in any of its courts.

"There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law, no person had ever been convicted of crime by less than the concurrent assent *of twelve of his peers;* and no law has ever attempted to authorize it to be done.

"If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. The same constitutional provision that secures the right in a charge involving the life of the accused secures it also in every other criminal case. It is no answer to say that this would not likely be done. *If it had been deemed safe to leave it to the discretion of the general assembly, no constitutional provision was needed;* but, whether needed or not, it has been ordained by a power which both the general assembly and this court are bound to obey.

"A moment's consideration will show that diminishing the number impairs the right, lessens the security of the accused and increases the danger of conviction.

"If corruption or prejudice are to be feared and avoided, they are much more likely to influence the conduct of six men than of twelve; and if the jury are honest, impartial, and pure, it is a self-evident fact that the chances of a conviction upon conflicting evidence, by the unanimous approval of the larger number, is many times less than by the smaller. Nor is a conviction, even in cases to which this act extends, a matter to be lightly considered. *The reputatoin and hopes of a man, and all those who stand connected with him, may be as effectually blasted by an unjust verdict of guilty upon a charge of petit larceny as for many crimes of much higher grade.*

"But without pursuing these considerations further, our opinion is that the essential and distinguishing features of the trial by jury, as known at common law, and generally, if not universally, adopted in this country, were intended to be preserved, *and its benefits secured to the accused in all criminal cases, by the constitutional provisions referred to;* that it is beyond the power of the general assembly to impair the right, or materially change its character; that the number of jurors can not be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act

under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void.

"In coming to this conclusion, we have not referred to the decisions in other states, because we were entirely willing *to take the responsibility of considering the question upon principle alone.*. The question has seldom arisen, but whenever it has, the same result has followed, without a single dissenting opinion or *dictum* to the contrary, so far as we are advised.

"*We have deemed it our duty to meet and arrest, at the outset, what we can not but regard as an infringement of a great constitutional right—not in a very flagrant manner, but, nevertheless, opening the door to further encroachments.*. So far as the argument of convenience and expedition is concerned, we can not do better than to reply, in the language of Justice Blackstone: 'However *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fraudulently opposite to the spirit of our constitution; and that, *though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.*"

"It would not be appropriate, nor do we intend to extend this opinion to determine the application of the right of trial by jury in civil cases. It is, however, well known that it never extended to all courts having civil jurisdiction, nor to the trial of all disputed facts.

"Section 5, article 13, has sometimes been referred to as containing, by implication, a warrant for supposing it was intended to authorize a jury of less than twelve, by the section of the constitution which we have been considering. This section relates to the compensation required upon appropriating the right of way to the use of a corporation, authorized to construct a public improvement, and provides that such "compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

"Why, it is asked, fix the number here, if the term 'jury,' used in other sections, *ex vi termini*, implies that number? The reason is obvious, and the answer plain. It has been held in Willyard v. Hamilton, 7 Ohio, 115, pt. 2, that the value of

property taken for public uses might rightfully be assessed by commissioners, it not being a case for trial by jury, secured by the constitution; and that the proceeding need not be had in a court of justice. And the reason why it was not secured by the constitution was, that it had never been so regarded in England or this country prior to the adoption of that instrument. This course of proceeding by commissioners had been much complained of as unjust and oppressive to the owner of the property: and to make at once a proceeding within the protection of the constitution, and to be pursued in a court of justice with a common law jury, this section 5 of article 13, was inserted when the constitution was revised.

"It intended to afford the party the same protection as in other cases of jury trial—no more and no less; and if any inference is to be drawn from specifying the number of the jury, it is very strong evidence of the sense of the convention that that was what had already been secured by the other sections to suitors in other cases."

Work v. State of Ohio, 2 Ohio St., pp. 301, 308.

A jury from the district "wherein" the crime was committed—in criminal territory—a jury of his peers—is as much an historical element in the constitutional term "jury," as are any of the above elements contended for by our Supreme Court so strenuously and so earnestly. "A jury trial inviolate" has always been jealously guarded by the courts of Ohio and of the United States.

VII.

NOT A TRIAL "WITHIN" THE DISTRICT "WHEREIN" THE CRIME WAS COMMITTED.

We submit to the court the proposition that the jury is not a jury from "within" the district, territory or county wherein the crime was committed," or could be committed. The constitutional guarantee implies "within the territory" that was, or is, or has "criminal jurisdiction." Nineteen-twentieths of such territory being "wet," or non-liability territory, or non-

criminal territory, does not comply with the purposes or the letter of the constitution in this behalf.

To select a jury over the Indiana line or beyond the county line, might be geographically "within the district or vicinage;" might be within one mile or less of the place of the crime, but if any part of that district was "non-criminal territory" over the county line, or across the state line, such a jury would be unconstitutionally selected, and such a law void, or an executive act carrying out such act would be void.

VIII.

Said statute further deprives relator of the due process of law in that the General Assembly did not define "wholesale" and "retail," and wholly failed to *limit* the amount *of the fine or penalty to be imposed by the court,* in case the accused is found guilty, as it appear in the provisions of this act. It is the duty of the legislature to *define crime* and to *fix the boundaries or limitations of penalties* and they cannot *vest legislative powers in the judiciary* in a republican form of government. The executive, legislative and judicial departments of government should be well defined and neither department of the government can delegate such power to the other department of the government. The accused is therefore deprived of "the due process of law" in this behalf, in that, the General Assembly does not *define the crime and limit the punishment.*

> "Within *such bounds as may be prescribed by law,* the question what fine shall be imposed is one addressed to the sound discretion of the court. But such discretion must be judicially exercised" (and be bounded by legislative limitation). Cooley's Const. Lim., 6th Ed., pg. 401.
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> "It has been decided by the Supreme Court of Connecticut that it was not competent in the punishment of a common law offense to inflict fine and imprisonment

without limitation. The precedent, it was said, cited by counsel contending for the opposite doctrine, of the punishment for a libel upon Lord Chancellor Bacon, was deprived of all force of authority by the circumstances attending it; the extravagance of the punishment being clearly referable to the temper of the times. The common law can never require a fine to the extent of the offender's goods and chattels * * * The punishment is both uncertain and unnecessary. It is no more difficult to limit the imprisonment of an atrocious offender to an adequate number of years than to prescribe a limited punishment for minor offenses. And when there exists no firmly established practice and public necessity or convenience does not imperiously demand the principle contended for, it cannot be justified by the common law, as it wants the main ingredients on which that law is founded. *Indefinite punishments are fraught with danger, and ought not to be admitted* * * * *."

"A defendant, however, in any case is entitled to have the precise punishment meted out to him which the law provides and no other."
Cooley's Const. Lim., 6th Ed., 402, 403.

"Municipal authorities empowered to close drinking places "temporarily" cannot order them closed 'till further order,' but must define the time. State v. Strauss, 49 Md., 288. The keeping open after hours cannot be made a breach of the peace allowing arrest without a warrant. People v. Haug, 37 N. W. Rep., 21 (Mich.)

Respectfully submitted,

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Attorneys for Plaintiff in Error.

APPENDIX.

The Beal Law.

Section 1. That Section 4364-20 of the Revised Statutes be amended so as to read as follows, and be supplemented by the enactment of the following supplementary sections, to wit, Sections 4364-20*a*, 4364-20 *b*, 4364-20*c*, 4364-20*d*, 4364-20*e*, 4364-20*f*, 4364-20*g*, 4364-20*h*, and 4364-20*i*.

Sec. 4364-20. That the sale of intoxicating liquors, whether distilled, malt or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist on a written prescription of a regular practicing physician for medical purposes only, is hereby declared to be unlawful, and all places where such intoxicating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed, and whoever makes any such sales, or allows any such place to be open or remain open on that day shall be fined in any sum not exceeding one hundred dollars and not less than twenty-five dollars for the first offense, and for each subsequent offense shall be fined not more than two hundred dollars or be imprisoned in the county jail or city prison not less than ten days and not exceeding thirty days, or both. In regular hotels and eating houses the word "place" herein used shall be held to mean the room or part of room where such liquors are usually sold or exposed for sale and the keeping of such a room or part of room securely closed shall be held, as to such hotels and eating houses as a closing of the place, within the

meaning of this section. And any municipal corporation shall have full power to regulate the selling, furnishing or giving away of intoxicating liquors as a beverage and places where intoxicating liquors are sold, furnished or given away as a beverage, except as provided for in Section 4364-20*c* of this act.

Sec. 4364-20*a*.. That whenever forty per cent. of the qualified electors of any municipal corporation shall petition the council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such municipal corporation, such council shall order a special election to be held in not less than twenty nor more than thirty days from the filing of such petition with the mayor of the municipal corporation or from the presentation of such petition to said council, which said petition shall be filed as a public document with the clerk of the municipality, and preserved for reference and inspection, and which election shall be held at the usual place or places for holding municipal elections, and notice shall be given and the election conducted in all respects as provided by law for the election of members of the council of the corporation, so far as said law may be applicable. The result of such election shall forthwith be entered upon the record of the proceedings of the council of the corporation by the clerk thereof, and in all trials for violation of this act, the original entry of the record, or a copy thereof certified by the clerk of the corporation, provided that said record shows that a majority of the votes cast at said election was against the sale of intoxicating liquors as a beverage, shall be PRIMA FACIE EVIDENCE that the selling, furnishing or giving away of intoxicating liquors as a beverage or the keeping of a place where such liquors are sold, kept for sale, given awy or furnished, if such selling, furnishing or giving away or keeping such place occurred after thirty days

from the day of holding the election, was then and there prohibited and unlawful.

Sec. 4364-20*b*.. The ballots at any special election, held under the provisions of this act, shall be printed with an affirmative and a negative statement, to wit: "The sale of intoxicating liquors as a beverage shall be prohibited," "The sale of intoxicating liquors as a beverage shall not be prohibited," with a blank space on the left side of each statement in which to give each elector an opportunity to clearly designate his choice by a cross mark as follows:

[.....] The sale of intoxicating liquors as a beverage shall be prohibited.

[.....] The sale of intoxicating liquors as a beverage shall not be prohibited.

And if a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding said election it shall be unlawful for any person, personally or by agent, within the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished, for beverage purposes, and whoever from and after the thirty days aforesaid in any manner directly or indirectly, sells, furnishes, or gives away, or otherwise deals in any intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, either permanent or transient for such selling, furnishing or giving away or in which or from which intoxicating liquors are sold, given away or furnished or otherwise dealt in as aforesaid, shall be guilty of a misdemeanor, and shall on conviction thereof, be fined not more than two hundred dollars nor less than fifty dollars for the first offense, and shall for a second offense be fined not more than five hundred dollars nor less than one

hundred dollars, and for any subsequent offense BE FINED NOT LESS THAN TWO HUNDRED DOLLARS AND BE IMPRISONED NOT MORE THAN SIXTY DAYS AND NOT LESS THAN TEN DAYS. (BUT NOTHING CONTAINED IN ANY OF THE SECTIONS OF THIS ACT ~~SHALL~~ IN ANY MANNER AFFECT THE RIGHT OF ANY MANUFACTURER OF INTOXICATING ~~LIQUORS~~ FROM THE RAW MATERIALS TO SELL, DELIVER AND FURNISH HIS PRODUCT IN WHOLESALE QUANTITIES TO BONA FIDE RETAIL DEALERS TRAFFICKING IN INTOXICATING LIQUORS OR IN WHOLESALE QUANTITIES TO ANY PARTY OR PARTIES RESIDING OUTSIDE OF THE LIMITS OF SAID MUNICIPALITY).

Sec. 4364-20*c*. The phrase "intoxicating liquors," as used in this act shall be construed to mean any distilled, malt, vinous or any other intoxicating liquors; but nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes; and when sold for medicinal purposes it shall be sold only in good faith upon written prescription issued, signed and dated, in good faith by a reputable physician in active practice and the prescription used but once. The words "giving away," where they occur in this act shall not apply to the giving away of intoxicating liquors BY A PERSON IN HIS PRIVATE DWELLING UNLESS SUCH PRIVATE DWELLING IS A PLACE OF PUBLIC RESORT.

Sec. 4364-20*d*. When any person, company or corporation has discontinued such traffic in accordance with the provisions of this act, within the time specified by section 4364-20*a* of this act, has paid or is charged upon the tax duplicate with an assessment upon such traffic, the county auditor, upon being satisfied of such fact, shall issue to such person, company or corporation, a refunding order of an amount proportionate to the unexpired time for which said assessment has been paid.

Sec. 4364-20*e*.. The petition for an election provided for in section 4364-20*a* of this act shall be deemed sufficient, and the council shall order such an election when the petition is signed by as many qualified electors as shall equal in number forty per cent. of the number of votes cast in said municipal corporation at the last preceding general election in municipalities which are divided into wards; and in all other municipalities, forty per cent. of the voters at the last preceding municipal election, and in indictments, affidavits or informations for violation of this act it shall not be necessary to set forth the facts showing that the required number of electors in the municipal corporation petitioned for an election, that the election was held, or that the majority voted in favor of prohibiting the sale as herein provided. But it shall be sufficient to state that the act complained of was then and there prohibited and unlawful.

Sec. 4364-20*f*. The following shall be deemed a sufficient entry and record of the result of an election held under the provisions of this act as required by sections 4364-20*a* and 4364-20*b*:

The State of Ohio, County of ————, municipal corporation of ————

The special election held on the ——— day of ———, A. D. ———-, within and for the (municipal corporation of ———) under the local option law resulted as follows:

Whole number of votes "for the sale of intoxicating liquors as a beverage" .....

Whole number of votes "against the sale of intoxicating liquors as a beverage" .....

Clerk of .....

Sec. 4364-20*g*.. Money received from fines and forfeited bonds collected under the provisions of this act shall be paid into the treasury of the municipal corporation wherein said fine

was imposed or bond forfeited, and shall be applied to such fund or funds as the council of said corporation may direct.

Sec. 4364-20*h*.. At any time after two years from the date of an election held under the provisions of section 4364-20*a* of this act another election may be petitioned for and shall be ordered as provided for in section 4364-20*a*.

Sec. 4364-20*i*.. Any person being a qualified elector of any municipal corporation wherein an election shall have been held as provided for in this act may contest the validity of such election by filing a petition duly verified with the Probate Court of the county in which such municipal corporation is situated, within ten days after the election, setting forth the grounds for contest.

The probate judge, upon the filing of such petition, shall forthwith issue a summons, addressed to the mayor of such municipal corporation, notifying him of the filing of such petition and directing him to appear in said court on behalf of said municipal corporation, at a time named in the summons, which time shall be not more than twenty days after the election nor less than five days after the filing of such petition.

The probate judge shall have final jurisdiction to hear and determine the merits of the proceedings, and in other respects in the procedure of the hearing he shall be governed by the law providing for the contesting of an election of a justice of the peace so far as such law is applicable. The Probate Court shall require the person or persons contesting the election to furnish sufficient security for costs before said petition is filed.

Sec. 2. That section 4364-20 of the Revised Statutes of Ohio be and the same is hereby repealed, but an ordinance passed by a municipal corporation under the authority given in said section prohibiting places where intoxicating liquors are sold at retail shall remain in full force and effect until thirty days after an election has been held in accordance with the

provision of section 4364-20*a* of this act. An ordinance passed by a municipal corporation under the authority given in said section regulating places where intoxicating liquors are sold at retail, shall remain in full force and effect until said ordinance is repealed or amended under the authority granted in section 4364-20 of this act.

Sec. 3. This act shall take effect and be in force from and after its passage.

W. S. McKINNON,
Speaker of the House of Representatives.
CARL L. NIPPERT,
President of the Senate.

Passed April 3, 1902.

[House Bill No. 1011.]

AN ACT

To supplement section 4364-9 of the Revised Statutes of Ohio and to provide for a tax upon, and to regulate the business of the sale of intoxicating liquors upon dining and buffet cars upon railroads traversing the state of Ohio.

Be it Enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 4364-9 of the Revised Statutes of Ohio be supplemented so as to read as follows:

Sec. (4364-9) Sec. 2. That each railway corporation within the state of Ohio, which shall maintain or conduct dining or buffet cars upon any of its trains, and shall desire to dispense, spiritous, vinous, malt or other intoxicating on buffet cars, within the state of Ohio, shall apply to the auditor of state, who shall assess such railway upon the business of trafficking in such liquors, an annual tax as follows: the sum of three hundred and fifty dollars, when such railway corporation mainatins, operates or controls not to exceed two hundred miles of railway within this state, and the sum of seven hundred dollars,

when such railway corporation maintains, operates or controls over two hundred miles of railway within this state.

Sec. (4364-9) Sec. 3. That money paid under this act shall be paid by the railway corporation, making such payment, to the treasurer of state, upon the warrant of the auditor of state, which payment shall be made on or before the tenth day of January of each year, and when such payment is not made until on or after June 10th, then one-half of such annual payment shall be so made. And upon the payment of such sum, the treasurer of state shall deliver to such railway corporation a receipt for the sum so paid, which receipt, duly signed by the treasurer of state, shall be sufficient evidence of compliance with the provisions of this act, and shall authorize said railway corporation to conduct said business until the 10th day of January next succeeding.

Sec. (4364-9) Sec. 4. When any railway corporation, so trafficking in spiritous, vinous, malt or intoxicating liquors as aforesaid, shall neglect or refuse to so pay such sums of money aforesaid, it shall be subject to pay the penal sum of one thousand dollars, to be recovered in an action brought in the name of the state of Ohio by the attorney general of the state and against such railway corporation, in any court of record, in any county of the state, into or through which a line or lines of such railway corporation run, and to pay in addition thereto the costs accruing in such action.

SECTION 2. This act shall take effect and be in force from and after its passage.

W. S. MCKINNON,
Speaker of the House of Representatives.
F. B. ARCHER,
President of the Senate.

Passed May 12, 1902.

393G

PARKER v. COMMONWEALTH.

[6 Pennsylvania State, 507.]

Legislature can not delegate legislative power to the people at large or to any portion of them.

Statute authorizing voters to decide whether liquor shall be sold or licenses granted within their boroughs, wards, etc., in particular counties, by a majority vote, and providing for the punishment of persons selling liquor in boroughs deciding against it, is unconstitutional.

Error from Allegheny county quarter sessions. The plaintiff in error was convicted under the act of 1846 of selling liquor in a certain ward of Pittsburgh, after the voters of said ward had decided against sales of liquor therein, as provided in said act. The question was as to the constitutionality of the act, the provisions of which are sufficiently stated in the opinion. The court below held the act constitutional.

McCandless and Wood, for the plaintiff in error.
Forward and Alden, contra.

By Court, Bell, J. The defendant below, plaintiff in error, having been convicted upon an indictment, framed under the act of seventh of April, 1846, entitled "An act authorizing the citizens of certain counties to decide by ballot whether the sale of vinous and spiritous liquors shall be continued in said counties," the point is raised in this court whether the act is, in truth, a law of binding force.

It is to be regretted that this very grave constitutional inquiry, as it is presented to us, is interwoven with a question of public morals which has stirred the hearts and occupied the minds of the American people with such intensity of feeling as to make it difficult to consider any proposition, even accidently connected with it, in reference to its abstract merits alone. In approaching the discussion of such a proposition, the mind is

almost involuntarily drawn to contemplate the amelioration which active philanthropy has, within a few years, effected in the social habits of our widely spread community; and the inquirer is tempted to shrink from the discharge of a task imposed by the deepest sense of duty, lest the result of his investigations might, even incidentally, check the growth of private and public improvement. But though the point presented for decision is highly important, considered simply in its connection with the subject I have alluded to, it becomes of infinitely greater magnitude when it is regarded as a question in political philosophy, springing from the peculiarities of our modes of government. In this aspect, it is intimately associated with the practical operation upon society of the written constitution, not only of this commonwealth, but of every other state of the confederacy. Reaching far beyond any single subject of legislation, it embraces the whole range of topics that may fall under legislative cognizance, and, as it may be decided, restrains or immeasurably enlarges the manner in which the legislative power may be exercised. Such is the nature and scope of the subject to which our attention has been invoked. Regarding it as perhaps the most important ever presented for adjudication here, involving principles that address themselves with great urgency to the interests of every member of society, we have considered it under a lively sense of the responsibility which, even in ordinary instances, attaches upon an inquiry into the constitutional action of the legislative body, but which is largely increased by the character and possible results of the present investigation. Unlike that of the United States, the government of Pennsylvania is not one of enumerated powers. Still, it is a government of limited authority; and it is, therefore, not to be denied that the action of its legislature may be invalid, though it contravene no express provision of the constitution, if it be in violation of the

spirit of that instrument, and the genius of the public institutions designed to be created by it. Indeed, it is this species of insiduous infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will generally be met by instant reprobation, while the stealthy and frequently seductive character of the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong.

Putting out of view, as far as possible, the particular object of the act which gives rise to the controversy, lest we be misled by the meritorious nature of its aim; and addressing ourselves to the reasoning which must be equally applicable to all similar instances of legislative action, we will inquire whether there has been such an encroachment upon the constitution of the state, and the admirable political system created by it, as calls for the interposition of this court. In doing so, we are necessarily led into an examination of the structure of our systems of civil polity and government; and the aim and object of the eminent men who were charged with the important task of giving them a visible and distinctive shape. The earliest pages of our colonial history show, that from the beginning, the principles of civil and political liberty were understood and practiced by those who planted the germ of civilized society in this country. It is true, that acknowledging allegiance to a monarch and subservience to a foreign parliament, to which they conceded the *jura summi imperii*, the supreme and absolute authority, which, as it is said, must reside somewhere in every state, they did not formally claim as true the axiom, that all power emanates from the people. But, practically for all the purposes of internal rule, this principle was to a great extent acted upon. The form of government in the several colonies very soon resolved itself into the system of legislation

by agents selected by the people, to whom a liberal right of suffrage was accorded; and thus our early political institutions, almost everywhere, assumed the resemblance of a representative democracy. The American revolution introduced a new feature into the science of government, before speculated upon by theorists, but then, for the first time, formally and solemnly announced as constituting an important element in the political constitution of a nation. It is, in the language of our own bill of rights, in this respect, but an echo of prior declarations, that "all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness." But though it was thus proclaimed, that the sovereign power resided in the body of the people and that the only legitimate end of government is the promotion of their welfare, the utter impracticability of a personal and immediate exercise of this power by them, in the administration of the affairs of government, forbade the idea of a pure democracy. If such a form of civil rule can exist in a civilized community, it must be, as is well observed by an acute writer on this subject, when the limits of a state are so confined, that the people can assemble as often as may be requisite for the administration of the public concerns from every part of the state; but such a state must have too small a population to protect itself against the hostile designs and attacks of powerful or ambitious neighbors, or too small a territory to support the number of its inhabitants; either of which circumstances must continually endanger its safety and independence.

Our widely extended country and numerous population concurred, even in the early days of the republic, to put this simple form of administration out of the question. But had these reasons been wanting, other important objections would have interposed to prohibit the immediate exercise of administrative authority by the mass of the community acting

directly on the subject. Among these may be mentioned the necessarily uncertain and fluctuating character of popular decisions, induced by the excitement of collision, and often by unreasoning passion and prejudice; the violent commotions to which popular assemblies are constantly exposed, especially when acting under the influence of party zeal, inflamed by the seductions of factious eloquence and artful sophistry; the difficulty, if not impossibility, of deliberation and consultation, and above all, the imminent danger that, in the absence of a sense of responsibility, the surest guaranty of social justice, the rights of the minority would be disregarded by a majority seeking only the gratification of its own desires or the advancement of its peculiar opinions. In discussing proposed schemes of government, these objections had not escaped the public attention, of which the public debates of that day give ample evidence. In proof of this, it may be sufficient to quote from Mr. Madison, whose enlightened predilection for popular institutions will not be questioned. In the course of the debates on the federal constitution in the Virginia convention, he remarked, "that turbulence, violence, and abuse of power by the majority trampling on the rights of the minority, have produced factions and commotions, and these, in republics, more frequently than any other cause, have produced despotism." And, again, he observed: "If we go into the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from these causes. If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes here would result in the same fatal effects which they produced in those republics." This was but an expression of the prevailing sentiment. In accordance with it, though all the written constitutions framed by the several states of the confederacy acknowledged

the sovereignty to reside in the mass of the people, its exercise by them was, either expressly or by necessary implication, confined to the establishment of the constitution, the amendment of its defects, the correction of the abuses of government, and the choice of public servants. In the country from whence we derive our language and the great body of our law, the supreme power is conceded to be vested in the parliament. There, sovereignty and legislation, are said to be convertible terms: and, it is asserted, one can not subsist without the other.

But with us, the introduction of original written compacts, framed by the people themselves, has established a marked distinction between the indefinite and unlimited power of the community, considered as a whole, and the definite and limited power of the legislature. By these compacts, so much of the sovereign authority as is necessary for the making of laws, is delegated to the selected agents of the mass; but it must be exercised in the mode and manner pointed out by the compact itself. This observance is essential to the very existence of the constitution of a state; for that is the instrument by which the administrative authority is created, its powers defined, and their extent limited, the duties of the public functionaries prescribed, and the principles according to which the government is to be administered—delineated: Paine's Rights of Man, part I, p. 42; or, in the language of Judge Patterson, truthful as eloquent: *Vanhorne's Lessee* v. *Dorrance*, 2 Dall., 308; "It is the form of government delineated by the mighty hand of the people, in which certain first principles or fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must pro-

ceed from the same hands." Until altered or destroyed by this authority, it is obligatory on the people themselves; and legislatures, which are merely its creatures, must conform to it, or their acts will be void. Everything done in contravention of its principles is an act of usurpation, which, uncorrected, tends directly to its overthrow. Mindful of the ancient institutions of the country, and following the example set by the federal constitution, the people of Pennsylvania, when ordaining and establishing a fundamental law for the government of the commonwealth, decreed that the legislative power shall be vested in a general assembly, to consist of a senate and house of representatives, to be elected at stated periods by the citizens of the respective counties. They thus solemnly and emphatically divested themselves of all right, directly, to make or declare the law, or to interfere with the ordinary legislation of the state, otherwise than in the manner pointed out in article 9, section 20, which declares "the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address, or remonstrance." This provision which found a place in the constitution of 1790, is reiterated and re-established by the amended constitution of 1835, adopted by a vote of the whole people: thus conclusive showing that the experience of nearly half a century had worked no change in the sentiment which legislative action. No man is bound, under the constitution, to selected and responsible bodies of men, liable to the animadversion of their constituents, as the only safe depository of this portion of the sovereign power.

Desiring to interfere no further with the regulated action of these bodies than in the mode thus expressly reserved, by the right of selecting the delegates composing them, and through the influence which inevitably flows from enlightened

public opinion, deliberately and temperately expressed, the people sought to guard against an abuse of the high power they had delegated, by providing a specific mode of election of members of the senate and house of representatives, by prescribing their qualifications; by stipulating the separate and independent action of the two chambers; by an appeal to the conscience in the oath or affirmation exacted from each member to support the constitution of the commonwealth, and to perform the duties of his office with fidelity; and by conferring on the chief executive magistrate the prerogative of the veto, designed for the correction of hasty and inconsiderate legislation. The system so established is a system of checks and balances, seeking safety in the declared responsibility of the individual agent, and the guardian watchfulness of the co-ordinate branches. The sedulous care exerted by those who devised it, to hedge it round with defenses against the attacks of popular delusion and error from without, and to guard it against faithfulness and corruption from within, is visible in almost every line of the instrument that delineates it. The authority conferred is, in its execution, of the greatest difficulty and delicacy, requiring frequently, in its use, the nicest discrimination of cultivated and disciplined intellect; and as its active influence upon the interests of the community, for weal or for woe, can not be resisted, it has been wisely lodged where experience taught it could be most safely and conveniently exerted. To exercise the power of making laws delegated to the general assembly, is not so much the privilege of that body as it is its duty, whenever the good of the community calls for legislativ eaction. No man is bound, under the constitution, to accept the office of legislator; but he who does so accept, can not, rightfully, avoid the obligations it imposes, or evade the constitutional responsibilities incident to it. As has been well remarked, the constituent is entitled not only to the industry

and fidelity of his representative, but to his judgment also, in all that relates to the business of public legislation. Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, can not transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge, understanding, knowledge and rectitude. The maxim is, *delegata potestas non potest delegari*.. And what shall be said to be a higher trust, based upon a broader confidence, than the possession of the legislative function? What task can be imposed on a man, as a member of society, requiring a deeper knowledge and a purer honesty?

It is a duty which can not, therefore, be transferred by the representative; no, not even to the people themselves; for they have forbidden it by the solemn expression of their will that the legislative power shall be vested in the general assembly; much less can it be relinquished to a portion of the people, who can not even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community. An attempt to do so would be not only to disregard the constitutional inhibition, but tend directly to impress upon the body of the state those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered. Athens once possessed a government in a measure representative; but the decrees of its senate were subject to the supervision of the popular assemblies of the citizens, who, by progressive innovations, entirely changed the nature of the constitution, and introduced corruption, anarchy and final destruction. The people of this commonwealth, I repeat, have reserved to themselves the right to alter or abolish and reconstruct the political fabric; and may thus assume, if they please, the direct control

of ordinary legislation. But in the present advanced condition of political science, and recurring to the experience of the past, it is not to be presumed they will ever do so. Yet were this otherwise, it is not for their servants to anticipate the expression of such a will. The great question in this cause is, did the legislature of 1846 fall into this error? The proper solution of this question will be best determined by an inquiry into the nature of municipal laws, and ascertaining how far the act of assembly under review squares with the definition of such laws.

* * * * * *

But it is further urged that the act of assembly in question is to be regarded not as an act delegating the power of legislation, but as a conditional statute, to take effect or be void upon the happening of a contingency pointed out in the act itself. That the legislature may enact laws to take effect or expire at some future time, or upon a future event, is not to be denied. Our attention has been called to an instance of this kind, which, as it is supposed, proves the simply conditional character of the act of 1846. It is found in the legislation of Congress, prohibiting the introduction of British and French goods into the United States: unless these nations would respectively, modify their edicts interfering with neutral commerce. The first of these acts was passed in March, 1809, and was limited to expire on the last day of the then next session of congress. On the first of May, 1810, congress passed another act declaring that if either Great Britain or France should repeal or modify her edicts so that they should cease to violate the neutral commerce of the United States, the president should proclaim the fact; and in the event of the other nation not following the example, in three months thereafter, the interdictory sections of the act of 1809 should be revived in full force, or against the refusing nation; and that, as to the revok-

ing nation, the restrictions imposed by the act of 1810 should cease from the date of the proclamation. In the case of *The Aurora* v. *The United States*, 7 Cranch, 382, the right of congress to enact this law was called in question; but the Supreme Court of the United States held that congress might extend and revive the act of 1809 conditionally; upon the occurrence of subsequent events, to be ascertained by the president's proclamation. It is plain the revival or continued suspension of the act of 1809 was not made to depend upon the proclamation, but upon independent facts, of which the proclamation was evidence, after which the statute operated *proprio vigore*. In commenting upon these enactments, Chief Justice Booth, in the opinion already adverted to, observes: "Had the president been empowered to repeal existing laws, and create a new law, by the exercise of his will, and to announce his decision by a proclamation, as the people of New Castle county were empowered to do by the legislature of this state, and to have their decision announced by the returns of an election, there would be an analogy between the two cases. Were it possible to suppose such an absurdity on the part of congress, their act would have been declared void, which thus undertook to transfer the legislative power exclusively to the president, and so to abrogate the constitution."

These remarks are applicable to our own act of assembly; and to them may be added a notice of another and vital distinction between it and the legislation of congress. In the latter instance, the power which created the law was exerted by the federal legislature, looking to no external aid; but the production of our senate and house of representatives came forth maimed, impotent and functionless, until vivified by the popular breath. In the one case the decree is, this statute shall take effect in action, or its operation be suspended upon the occurrence of a particular event; in the other, this act shall be

inoperative, unless otherwise willed by the people. In the first case, the law remains quiescent until the happening of the appropriate event stirs it into motion; in the last, the so-called law was altogether without the power of motion, of itself, when it left the hands of the lawmakers. And this is the distinction between a conditional law, properly so denominated, and an act of the law-making power seeking to transfer its functions to another. The one leaves nothing to be done to perfect the rule of action; the other but molds the clay into shape, leaving to third persons the task of breathing into its mimic frame the energy of life. What is this more or better than simply preparing the *project* of a law to be submitted for the sanction of a distinct and independent tribunal, whose will is to determine its future existence or continued nonentity?

Another supposed parallel to the act of 1846 is thought by the counsel of the commonwealth to be found in the act of the fourteenth of April, 1835, which submitted to the citizens of the state the question whether a convention should be holden to propose and submit for their ratification or rejection a new state constitution. But very little reflection will satisfy the inquirer, that no such parallel exists. The question propounded for solution by the popular vote did not pertain to the ordinary business of legislation, but referred itself directly, to the eminent dominion which, as has been seen, resides only in the people, who are alone competent to decide upon any proposed modification of the fundamental law. The constitution of 1790 pointed out no particular mode by which an alteration of its provisions might be effected; and it was, therefore, convenient that the legislative body should indicate the manner in which the popular will might be manifested in respect to a subject which only the popular will was competent to deal with. An act of assembly was not essential to this purpose, but simply convenient. Though enacted with all the forms of

a law, it was not in truth a law; for it contained nothing binding or obligatory on the people, who were at liberty to obey or disobey it, as they saw proper. They might have moved without such an act; and its enactment, to regulate and direct the movement, certainly added nothing to its efficiency, other than as furnishing a means for ascertaining, with certainty, the public decision. The existence of the legislative resolutions neither added to, nor detracted from the force of the decision when made; nor did the resolution, as a legislative act, derive any superior sanction from the decision. One depended in no degree upon the other; but each was, in itself, perfect within its proper sphere. The legislature was powerless to alter the constitution; but it possessed the right to invite the people to express their wishes on the subject. The people were unequal to an ordinary act of legislation; but they might, if they would, change the frame of their government. They did change it in some of its features; but this was done of their own absolute and inalienable power and not by virtue of authority delegated to them by the legislature; for the act of the twenty-ninth of March, 1836, providing for the call of a convention, was but the vehicle to carry the public wish into effect. There is, in fact, not the slightest resemblance between the initiatory legislative step which resulted in a change of the constitution, and that by which they called the people into legislative council. Indeed, so entirely dissimilar are the two cases, it is strange a likeness should have been imagined.

With a single exception, to be presently noticed, what has been said disposes of all that was urged upon the part of the commonwealth, as tending to support the validity of the act of 1846. But since the argument of the case, it has been suggested, that instances of a valid delegation of legislative authority, are to be found in the statutes made by congress from time to time, erecting portions of the public domain into territories,

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and organizing them for the purposes of government, by authorizing the appointment and election of executive, judicial, and legislative officers, and conferring on the latter the power to make laws, subject to the approval of congress. It is true that, by these congressional acts, the legislative function is bestowed; and they therefore furnish examples of a delegation of legislative authority by a body which is itself subordinate. But the right to exercise this high power is expressly granted by the federal constitution, which, by article 4, sec. 3, provides that "congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this grant, which was, indeed, indispensably necessary for the proper disposition and regulation of the widely spread districts of country belonging to the union, congress has rightfully enacted the laws referred to; and yet, mindful of the elementary principle upon which the republic is based, they have always invested the people of the territories with the choice of the legislative agents.

As already intimated, there is a class of statutes, of modern origin, which it is difficult to recognize as being constitutionally made. I allude to a series of acts of assembly, which seem to have originated as late as the year 1839, and been repeated, in successive years, down to the present. These provide all the details necessary for the erection and government of houses for the support and employment of the poor, in the county named in each of these acts, but close with a direction, that the question of erecting a poor-house shall be submitted to the decision, by ballot, of the people of the particular county; and according to the result of the vote, the act shall take effect or be null and void. Whether this provision can, in principle, be distinguished from that we have been reviewing, it is not now necessary to decide and perhaps may never be. If it be uncon-

stitutional, these acts may be cited as showing how silently and insiduously a dangerous practice may creep, unnoticed, into the legislation of the state; but surely they can not be called in to justify a continuance of the practice. Being limited in their objects and effects, they are perhaps no further injurious than as furnishing precedents of improper legislation, at first touching matters of small moment, but sure, in the end, to be extended to subjects of more general concern. It may be mentioned, as worthy of remark, that this species of legislation, if it can with propriety be so called, has grown into use within a very recent period; and, it is believed, until the passage of the act of 1846, was confined to objects of a local character, not calculated to awaken the general attention; and it is perhaps ascribable to this fact that they have been suffered to pass without complaint.

For the reasons which have been given, the court, after much reflection, and not without reluctance, is forced to the conclusion that, the act of assembly upon which the plaintiff in error stands convicted, is inoperative and void, and, consequently, does not warrant the judgment pronounced by the court below. It is, therefore, reversed, and the plaintiff in error is to be discharged without day.